Jurisdictional Statement

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FIRST WEST VIRGINIA BANCORP, INC.,
FIRST WEST VIRGINIA BANK, N.A.—COMMUNITY, and
FIRST WEST VIRGINIA BANK, N.A.—WARWOOD,
Appellants,

v.

SECURITY NATIONAL BANK & TRUST CO., and
HALF DOLLAR TRUST AND SAVINGS BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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QUESTION PRESENTED

Whether Section 31A-8-12(b) of the West Virginia Code, as retroactively applied to compel a change in the ownership of one of two national banks lawfully acquired by a bank holding company, with the approval of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System, is repugnant to the Constitution and laws of the United States in that it unduly intrudes into the administration of the national banking system and burdens the operation of a national bank.

Pursuant to Rule 28.1 of the Supreme Court Rules, appellants state that all of the parties to this appeal are listed in the caption. None of the appellants (First West Virginia Bancorp, Inc., First West Virginia Bank, N.A.—Community, and First West Virginia Bank, N.A.—Warwood) has any other parent, subsidiary or affiliated corporations.

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HALF DOLLAR TRUST AND SAVINGS BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

First West Virginia Bancorp, Inc., First West Virginia Bank, N.A.—Community, and First West Virginia, N.A.—Warwood appeal from the final judgment of the Supreme Court of Appeals of West Virginia, dated May 5, 1981, holding that Section 31A-8-12(b) of the West Virginia Code, as applied retroactively to force a change in the ownership of one of two national banks whose affiliation in a bank holding company had been approved by two federal bank regulatory agencies at a time when state law did not prohibit such affiliations, does not violate the Supremacy Clause of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia, which is reported at 277 S.E.2d 613, is reprinted in the appendix hereto, page 1a, *infra.*

The opinion of the Circuit Court of Ohio County, West Virginia, which has not been reported, is reprinted in the appendix hereto, page 8a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia holding that Section 31A-8-12(b) as retroactively applied in this case is not repugnant to the Constitution and laws of the United States was entered on May 5, 1981. This appeal is being docketed in this Court within 90 days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISION AND STATUTE

a. *United States Constitution, Art. VI. cl. 2:*

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

b. *West Virginia Code § 31A-8-12(b):*

"It shall be unlawful for any individual, partnership, society, association, firm, institution, trust, syndicate, public or private corporation, or any other legal entity, or combination of entities acting in concert, to directly or indirectly own, control or hold with power to vote, twenty-five percent or more of the voting shares of each of two or more banks, or to control in any manner the election of a majority of the directors of two or more banks. . . ."

STATEMENT OF THE CASE

This appeal questions the constitutionality of a 1975 West Virginia statute, enacted to prohibit multiple ownership of banks in that state, insofar as it was applied retroactively to force a change in ownership of one of two commonly-owned national banks. Prior to the enactment of the West Virginia statute, the two national banks had, with the express approval of the Board of Governors of the Federal Reserve System and the Comptroller of the Currency of the United States, joined together as subsidiaries of a bank holding company. Because the divestiture ordered under the state statute threatens to weaken the competitive position and financial stability of the national bank to be divested, this retroactive application of the West Virginia statute represents an impermissible intrusion by the state into the operations of the national banking system.

In 1974, Warwood National Bank and Community National Bank—two small national banks in Wheeling, West Virginia—resolved to combine their operations into a somewhat larger banking system by forming, and reorganizing themselves as subsidiaries of, a new bank holding company, First West Virginia Bancorp, Inc. ("Bancorp"). On July 25, 1974, Bancorp filed an application with the Federal Reserve Board pursuant to Section 3(a)(1) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(a)(1), seeking approval for the formation of the new holding company.

After the required public comment period and its own investigation, the Board, on November 20, 1974, unanimously approved Bancorp's acquisition of the two national banks. 60 Fed. Res. Bull. 878 (1974) (App. 18a). The Board noted that both of the banks were very small and that, following the acquisition, Bancorp would be only the eighth largest banking organization in the Wheeling area, holding less than five percent of commercial bank deposits in the market. (App. 19a.) The Board concluded that Bancorp's acquisition of the two banks would have no adverse effect on competition. To the contrary, the Board found that

> "approval of the proposal may have a salutary effect on competition since [Bancorp] would be able to

> compete more effectively with the four largest banks in the [Wheeling]market which hold, in the aggregate, approximately 50% of market deposits." (App. 19a.)

The Board further found that, by combining their financial resources and centralizing their operations, the two small national banks would be better able to serve the public:

> "... [Bancorp] should be able to raise additional capital more readily, should the need arise, than either bank would be able to raise individually.... [The acquisition] would enable the two banks to broaden existing services and to offer new services. These would include an installation of a new drive-in facility for Community Bank and an allocation of funds to be used for real estate mortgage loans by Warwood Bank. Thus, factors relating to the convenience and needs of the community to be served are consistent with approval of the application." (App. 19a.)

No issue was raised in the Federal Reserve Board proceeding as to the legality of the acquisition under West Virginia law, and no judicial review of the Board's decision was sought.[1]

On January 28, 1975, the Comptroller of the Currency also approved the Bancorp reorganization. On January 30, 1975, Bancorp acquired the two national banks.

Upon consummation of the acquisition, many of the operations of the two banks were consolidated and the promised new services initiated. Specifically, Bancorp reorganized the two banks by providing for joint management, by centralizing check processing and bookkeeping at Warwood National, by arranging for joint advertising and computer services, and by providing new employee benefits not previously available.

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[1] Under Section 9 of the Bank Holding Company Act, the right to judicial review of Board action expires unless a petition for review is filed within 30 days of the entry of the Board's order. 12 U.S.C. § 1848.

In June 1975, six months after the acquisition of the two national banks by Bancorp, the West Virginia legislature amended the state banking code to prohibit any person or entity from holding more than 25 percent of the voting shares of more than one bank. West Virginia Code § 31A-8-12(b). Bancorp, however, continued to operate as a multibank holding company, and no objection was raised to its continued ownership of its two banks by any state or federal banking or law enforcement authority.

In 1977, Community National appli[illegible] the Comptroller of the Currency for permission to relocate its main office. The appellees herein, Security National and Half Dollar—two larger banks with approximately 30 percent of commercial bank deposits in the Wheeling market—filed objections with the Comptroller arguing, *inter alia*, that Bancorp's acquisition of Community National and Warwood National in early 1975 should be retroactively invalidated under Section 31A-8-12(b).

On August 5, 1977, the Comptroller approved Community's relocation application over the objections of Security and Half Dollar. On December 22, 1977—two and one-half years after the effective date of Section 31A-8-12(b) and three years after the Federal Reserve Board and the Comptroller had approved the reorganization of the two national banks as subsidiaries of Bancorp—Security and Half Dollar filed this action seeking to invalidate the 1975 acquisition.

On October 17, 1979, the Circuit Court of Ohio County held that, despite the fact that Bancorp's acquisition of the two national banks was lawful under West Virginia banking law at the time of the acquisition, Section 31A-8-12(b) should be applied retroactively to force Bancorp to divest all the stock of one of the banks. (App. 8a.)[2]

Bancorp filed a timely motion for reconsideration by the circuit court, arguing that such a retroactive application of the state statute was invalid under the Supremacy Clause of the Constitution of the United States. With its motion for

[2] The circuit court's decision was delayed by removal proceedings in the United States District Court for the Northern District of West Virginia which eventually remanded the case to the state courts. The federal district court's opinion is reprinted in the appendix hereto, page 13a, *infra*.

reconsideration, Bancorp submitted the affidavit of its president detailing the advances made by the two banks following their consolidation and describing the adverse effects a forced divestiture would have on the banks, including the disruption of their joint management, the burden of additional and unnecessary costs, and the reduction of their financial resources. (App. 21a.)

Bancorp also provided the circuit court with the affidavit of the Senior Deputy Comptroller of the Currency for Bank Supervision expressing the position that such an attempt by a state to interfere with decisions of federal banking officials concerning the ownership of existing national banks threatened the administration of the national banking system itself:

> "... [T]he Comptroller considers his powers and prerogatives with respect to the ownership and control of national banks to be essential to his ability to carry out his responsibilities for administering the national banking system. The Comptroller's authority to determine who may control a new national bank, and to whom control may be transferred, is of particular importance to his ability to administer the system of national banks because of the impact that a controlling shareholder can have upon the health, stability and competitive effectiveness of a national bank." (App. 30a.)

Directly addressing the divestiture requirement in the West Virginia statute, the Comptroller stated:

> "Because a change in the control of a national bank could threaten to weaken the bank by diminishing its financial and managerial resources and by reducing its effectiveness as a competitor, the Comptroller believes that a state law or regulation that would have the effect of forcing a change in the control of a national bank could encroach on his authority and prerogatives, and could impede his ability to administer the national banking system. In particular, for a state to assert the power to require a controlling

> shareholder of a national bank to divest that control, where the control relationship has been expressly approved by the Comptroller and was wholly lawful at the time it was so approved, would imply a degree of state authority over the operation of national banks that is fundamentally inconsistent with federal authority in this area." (App. 30a.)

For these reasons, the Comptroller's Office urged the circuit court to reconsider its prior decision and to rule that "the West Virginia statute at issue in this case should not be applied retroactively in such a way as to force a divestiture of control of these two national banks." (App. 31a.) The circuit court, however, denied Bancorp's motion for reconsideration without a written opinion.

Bancorp thereupon petitioned for writ of error to the Supreme Court of Appeals of West Virginia, once again arguing that the retroactive application of the state statute would violate the Supremacy Clause. In a brief opinion, the supreme court of appeals rejected Bancorp's claims. Although acknowledging that a state statute may not validly apply to national banks if it "frustrate[s] the purpose for which national banks were created, or impairs their efficiency to discharge the duties imposed upon them by the law of the United States" (App. 4a), the court held that the West Virginia statute could be applied retroactively to force a change in ownership of one of the two banks owned by Bancorp.[3]

THE FEDERAL QUESTION PRESENTED BY THIS APPEAL IS SUBSTANTIAL

Since *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court has acted to protect banking institutions

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[3] The supreme court of appeals corrected the lower court's erroneous ruling that Bancorp had to divest all of the stock in one of the banks and tracked the language of the statute which prohibited Bancorp from owning more than 25% of the stock of two or more banks. (App. 7a).

The state supreme court subsequently suspended the execution of its judgment in order to permit the filing of this appeal.

created as instrumentalities of the federal government from state laws that would burden their efficient operation. In particular, the Court has, for more than one hundred years, precluded the states from applying state statutes to national banks when those laws

> "expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed on them by the law of the United States." *McClellan* v. *Chipman*, 164 U.S. 347, 357 (1896).[4]

As the Court stated in *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 248 (1944), state statutes and regulations must yield whenever they "infringe the national banking laws or impose an undue burden on the performance of the [national] banks' functions." More than eighty years ago, the Court stated that these rules were "axiomatic, and are sanctioned by the repeated adjudications of this court." *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). That line of authority remains unbroken today.[5]

In light of this clear and consistent rule against state intrusions into the formation and operation of national banks, the unprecedented divestiture decree in this case, which orders

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[4] *Accord, Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *Owensboro Nat. Bank* v. *Owensboro*, 173 U.S. 664, 667-68 (1899); *First Nat. Bank* v. *California*, 262 U.S. 366, 369 (1923).

[5] The lower federal courts have likewise consistently invalidated state statutes which conflict with federal banking law or impose an undue burden on the efficient operation of national banks. *See, e.g., State of North Dakota* v. *Merchants Nat. Bank & Trust Co.*, 634 F. 2d 368, 382 (8th Cir. 1980) (state common law of unfair competition conflicted with provisions of the National Bank Act and was therefore unenforceable against national banks); *Starr* v. *O'Connor*, 118 F.2d 548 (6th Cir.), *cert. denied*, 314 U.S. 695 (1941) (state escheat statute invalid); *United Missouri Bank of Kansas City* v. *Danforth*, 394 F. Supp. 774, 785-87 (W.D. Mo. 1975) (state Retail Credit Sales Act ceiling on interest rates could not be enforced against national banks); *Bank of America* v. *Lima*, 103 F. Supp. 916, 918 (D. Mass. 1952) (sale of travellers' checks by national bank did not subject it to jurisdiction of state statutes concerning the conduct of business by foreign corporations).

a change in the ownership of national banks previously approved by federal banking officials, cannot be allowed to stand.[8]

Under our dual banking system, which had its birth in the National Currency Act of 1863 and the National Bank Act of 1964, the Comptroller of the Currency has plenary authority to charter national banks at any location in any state without regard to state laws regulating banking. As one court has stated, "a state clearly has no authority to prohibit the creation of a national bank or, once established, to confine or restrict its operations." *Pineland State Bank* v. *Proposed First National Bank*, 335 F. Supp. 1376, 1379 (D.N.J. 1971), *citing Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558-59 (1962).

It is solely within the Comptroller's province to assess the need for a new bank, the character and ability of its management, and the adequacy of its capital. Where persons controlling a national bank conduct the affairs of the bank in an unsafe or unsound manner, the Comptroller may preclude them from participating in the affairs of the bank. 12 U.S.C. § 1818(c)(1). The Comptroller also has the authority to review and, if he determines it to be appropriate, to interdict any proposed transfer of as much as 10% of the voting stock of a national bank. 12 U.S.C. § 1817(j); 12 C.F.R. § 5.50.

Where Congress has intended that the Comptroller should apply restrictions in state law in exercising his judgment as to the authority he will confer upon national banks, Congress has explicitly so stated—as, for example, with respect to trust powers, 12 U.S.C. § 92a, and the establishment of branches, 12 U.S.C. § 36(c). *See First National Bank* v. *Dickinson*, 396 U.S.

[8] Although some other states have enacted prospective legislation prohibiting multiple ownership of banks by bank holding companies, these laws have thus far been careful to exempt existing ownership relationships. *See Braeburn Securities Corp.* v. *Smith*, 15 Ill.2d 55, 153 N.E.2d 806 (1958), *appeal dismissed*, 359 U.S. 311 (1959); *Opinion of the Justices*, 102 N.H. 106, 151 A.2d 236 (1959). Neither the courts below nor the appellees have cited any prior case involving the application of any such state statute to force a change in the existing ownership of a national bank.

122, 131 (1969); *First National Bank* v. *Walker Bank & Trust*, 385 U.S. 252, 257-62 (1966).

To be sure, national banks are not entirely immune from state law. They must obey certain requirements applicable to businesses and citizens generally. They have even been held subject to certain state laws dealing with banking practices, such as those intended to prohibit discrimination in lending, where those laws do not conflict with federal banking law or impair the efficiency of national banks in fulfilling their federally sanctioned functions. *See National State Bank* v. *Long*, 630 F.2d 981, 986-87 (3d Cir. 1980).[7]

But where state laws would intrude significantly into the operation of the national banking system, or impose burdens upon national banks of a sort that would lessen their ability to perform effectively, they have routinely been held inapplicable to national banks. For example, in *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), this Court held that a state statute which prohibited national banks from making certain claims in advertisements conflicted with the "necessary powers" provision of the National Bank Act, 12 U.S.C. § 24, which implicitly authorized national banks to advertise in a competitive manner.

The Court has similarly voided state laws which attempted to restrict the distribution of the assets of an insolvent national bank (*Davis v. Elmira Sav. Bank, supra*, 161 U.S. at 275; *Easton* v. *Iowa*, 188 U.S. 220 (1903); *Jennings v. United States Fidelity & G. Co.*, 294 U.S. 216 (1935); *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U.S. 227 (1935); or their trust activities (*First Nat. Bank* v. *Fellows*, 244 U.S. 416 (1917); *Missouri ex rel. Burnes Nat. Bank v. Duncan*, 265 U.S. 17 (1924); or the disposition of abandoned deposits (*First National Bank* v. *California*, 262 U.S. 366 (1923)).

Under these well-settled principles, it is clear that the West Virginia statute prohibiting the multiple ownership of banks

[7] Even in such cases, however, the sole responsibility for *enforcing* such statutes against national banks rests with the Comptroller rather than state officials. *See, e.g., National State Bank* v. *Long, supra*, 630 F.2d at 987-89.

cannot be retroactively applied so as to compel a change in the ownership of a national bank which was lawful at the time it was acquired and which was expressly approved by both the Comptroller and the Federal Reserve Board.[8] Such a retroactive application of the West Virginia statute would imply a degree of state control over national banks that is fundamentally inconsistent with the concept of a system of national banks whose creation, location and basic powers are subject only to federal authority. Clearly, the power to determine who may be an owner of a national bank—in particular the power to direct an existing owner to terminate its ownership—is, in practical effect, the power to determine whether the bank can operate effectively and efficiently.

Although it is equally questionable whether the West Virginia statute could be applied prospectively insofar as national banks are concerned, the Court need not reach that issue in this case. Whether or not a state may prohibit individuals or companies from owning more than one national bank in the future, the forced divestiture of existing ownership presents serious competitive and regulatory consequences of the sort that would not be presented if the prohibitions were only applied prospectively.

For example, Bancorp, in reliance on the prior approval of federal banking officials of its ownership of the two national banks, took a number of important actions to consolidate the banks' operations. Specifically, over a period of nearly three

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[8] In an attempt to escape the consequences of its retroactive application of the 1975 statute, the state supreme court suggested that Bancorp might have divined some prohibition on the dual ownership of banks from prior state legislation. As the circuit court noted, however, that prior legislation was inapplicable in the circumstances presented, (App. 9a-10a); and no one ever suggested that the acquisition by Bancorp was illegal under state law in 1974 when it was reviewed and approved by federal banking officials—the proper forum for resolving such an issue. *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965).

In any event, as evidenced by the decree issued by the state supreme court, which requires the divestiture of all but a 25% interest in one of the banks, the state supreme court retroactively applied the 1975 statute and not any prior version of the state banking law.

years when its right to own the two banks was unchallenged, Bancorp combined the management of the two banks, with a single system for bookkeeping, check processing, advertising, computer operations and personnel management. As a result of their consolidation, the banks were also able to raise their lending limits so as to compete more effectively with the larger banks in the area. The forced divestiture ordered by the courts below would destroy these combined relationships, substantially increase the banks' overhead costs, deprive them of experienced management, reduce their financial resources, and, as the state supreme court noted, thereby "seriously threaten the competitive ability and stability of one or both banks." (App. 3a, n.1.)[9]

The threat posed by such a forced divestiture to the banks involved in this case, and the implications of such actions for the national banking system as a whole, was emphasized by the Comptroller of the Currency in his affidavit submitted to the courts below:

> "Because a change in the control of a national bank could threaten to weaken the bank by diminishing its financial and managerial resources and by reducing its effectiveness as a competitor . . . a state law or regulation that would have the effect of forcing a change in the control of a national bank could encroach on [the Comptroller's] authority and prerogatives, and could impede his ability to administer the national banking system." (App. 30a.)[10]

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[9] The state supreme court quoted this conclusion from the affidavit of Ronald L. Solomon, Bancorp's president. (App. 24a.) There was absolutely no evidence before the courts below, which granted appellees' motion for summary judgment, that in any way controverted the testimony of Mr. Solomon.

[10] The state supreme court's only response to the clear conflict between the retroactive application of the West Virginia statute and federal banking law as applied in this case by the Comptroller and the Federal Reserve Board was to cite Section 7 of the Bank Holding Company Act, 12 U.S.C. § 1846, which provides that that Act is not to be construed to prevent a state "from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

The legislative history of Section 7, however, demonstrates that it was not intended to expand state authority with respect to the control of national

(footnote continues)

The retroactive application of the West Virginia statute in this case is thus clearly repugnant to the Constitution and laws of the United States in that it conflicts with federal banking law and policy, as applied in the specific decisions of federal banking officials approving the Bancorp's ownership relationship, and threatens to impair both the efficient operations of the national banks in this case and to interfere with the Comptroller's administration of the national banking system.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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(footnote continued)

banks, but merely to preserve existing state authority over bank holding companies:

> "... [T]he [Senate Banking] Committee wishes to emphasize that [Section 7] does not grant any new authority to States over national banks. The purpose of the section is to preserve for the States those powers which they now have in our dual banking system. It is always of utmost importance in legislation of this nature to preserve the dual system of national and State banks, and Section 7 must be viewed in that light." S. Rep. No. 1095, pt. 2, 84th Cong., 2d Sess. 5 (1956).

APPENDIX

FILED
May 5, 1981
Clerk of the Supreme Court of
Appeals of West Virginia

No. 14938

SECURITY NATIONAL BANK & TRUST CO., *et al.*,

v.

FIRST W. VA. BANCORP., INC.,
a Corp., *et al.*, *etc.*

Ohio County Affirmed.

Harshbarger, Chief Justice

1. State regulation of bank holding companies is not preempted by the federal Bank Holding Company Act, 12 U.S.C. §1841, *et seq.*

2. West Virginia may regulate activities of national banking associations if the regulations do not contravene national laws, frustrate the purpose for which the national banks were created or impair the effective discharge of their legal duties.

3. Code, 31A-8-12(b) prohibiting multibank holding companies may be applied to national banking associations.

4. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.

5. Private parties contracting about matters that are subject to state regulation, suffer no constitutional impairment of contractual obligations when the legislature reasonably changes the regulations through its police power for the preservation of community order, health, safety, morals or economic well-being.

Harshbarger, Chief Justice:

Security National Bank & Trust Co. and Half Dollar Trust and Savings Bank obtained a declaration from the Circuit Court of Ohio County finding First West Virginia Bancorp, Inc., a multibank holding company, in violation of W. Va. Code, 31A-8-12(b), and ordering:

> "defendant, First West Virginia Bancorp, Inc., a corporation, shall divest itself of all of the shares which it owns in either of the defendant banks, First West Virginia Bank, N.A.—Community or First West Virginia Bank, N.A.—Warwood, or, in the alternative, shall divest itself of seventy-five (75) per cent of the shares which it owns in both of the defendant banks . . . "

That Code section, as rewritten in 1975, provides:

> (b) It shall be unlawful for any individual, partnership, society, association, firm, institution, trust, syndicate, public or private corporation, or any other legal entity, or combination of entities acting in concert, to directly or indirectly own, control or hold with power to vote, twenty-five percent or more of the voting shares of each of two or more banks, or to control in any manner the election of a majority of the directors of two or more banks . . . .

Defendants First West Virginia Bank N.A.—Community and First West Virginia Bank N.A.—Warwood are national banking associations regulated by the United States Comptroller of the Currency. Defendant First West Virginia Bancorp., Inc. is a bank holding company operating by a November, 1974 approval by the Board of Governors of the Federal Reserve System, 12 U.S.C. §1841, *et seq*, and is incorporated in this

State. It purchased all shares of the other two defendants on January 30, 1975. The banks and holding company have directors and officers in common.[1]

I.

State regulation of bank holding companies is not preempted by the Federal Bank Holding Company Act, 12 U.S.C. §1841, *et seq.*, because Section 1846[2] specifically reserves to the

[1] Affidavit of Ronald L. Solomon, President and Chief Executive Officer of First West Virginia Bancorp, Record pp. 96-106, at p. 100-101:

"6. The senior management of Bancorp, Community Bank, and Warwood Bank is substantially interdependent in other positions as well. For example, Eugene Singer is Secretary of each, a Vice-President of Bancorp, a Vice President of Community Bank, and is in charge of operations for Bancorp and both banks. Charles Graham is a Vice-President of Bancorp, an Executive Vice-President of Community Bank, and is in charge of loans for Bancorp and both banks. James Davis serves as Auditor for Bancorp and both banks. If these individuals were required to resign from or terminate their relationships with one or the other bank, it would have a serious and prolonged adverse effect on their areas of responsibility. Such resignations and terminations of relationships would create a period of management confusion and inefficiency and would seriously threaten the competitive ability and financial stability of one or both banks.

7. Bancorp's board of directors is a further source of unified management strength. Each of the fifteen directors of Bancorp also serves as a director for either Community Bank or Warwood Bank; George Beneke and I serve as directors for all three organizations. The three committees of Bancorp—Budget and Marketing, Audit, and Executive—also serve on behalf of both banks, providing a common core of knowledge and guidance. In addition, the two separate bank boards now hold their meetings jointly within the Bancorp board. Thus, all directors work together to promote the growth of both banks. This has proven particularly important with respect to the recently relocated Community Bank, which was helped greatly in attaining local acceptance through the Warwood directors. In my view, a forced divestiture would adversely affect both banks for years to come by depriving the banks of the strengthened management resources that were a primary purpose of the acquisition. As a result, the growth prospects and competitive vigor of both banks would be impaired."

[2] 12 U.S.C. §1846:

"The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof."

states the power to regulate them. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980); *Whitney National Bank v. Bank of New Orleans and Trust Co.*, 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), *reversed on other grounds*, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965). *See generally* Hearing on S. 880, S. 2350 and H.R. 6227 Before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. (1955); Hearings on H.R. 2674 Before the House Committee on Banking and Currency, 84th Cong., 1st Sess. (1955). Comment, Branch Banking Limitations Held Applicable to Approved Bank Holding Company Operation, 39 N.Y.U.L. Rev. 686 (1964).

A state may prohibit bank holding companies, whether the banks are federal or state. *Cf. Commercial National Bank v. Board of Governors*, 451 F.2d 86 (8th Cir., 1971); *Grandview Bank & Trust Co. v. Board of Governors*, 550 F.2d 415 (8th Cir.), *cert. denied*, 434 U.S. 821 (1977). Our statute would be invalid only if its application to national banks "expressly conflict[s] with the laws of the United States or frustrate[s] the purpose for which the national banks were created, or impair[s] their efficiency to discharge the duties imposed upon them by the law of the United States." *McClellan v. Chipman*, 164 U.S. 347, 357, 17 S.Ct. 85, 87, 41 L.Ed. 461 (1896); *Anderson Nat'l. Bank v. Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944); *National State Bank v. Long*, 469 F. Supp. 1068 (D.N.J. 1979), *modified*, 630 F.2d 981 (3d Cir., 1980); *National Bank of Hyde Park v. Isaacs*, 27 Ill.2d 205, 188 N.E.2d 704 (1963); *Braeburn Security Corp. v. Smith*, 15 Ill.2d 55, 153 N.E.2d 806, *app. dismissed*, 359 U.S. 311, 79 S.Ct. 876, 3 L.Ed.2d 831 (1959); *Opinion of Justices*, 102 N.H. 106, 151 A.2d 236 (1959); Scott, The Patchwork Quilt: State and Federal Roles in Bank Regulation, 32 Stan. L. Rev. 687, 690-95 (1980).

II.

When Bancorp purchased the banks, our applicable statute was:

> (b) It shall be unlawful for any person to purchase and hold stock in any banking institution for the purpose of selling, negotiating or trading participation in the ownership thereof either for the purpose of perfecting control of one or more such banking institutions or for the purpose of inducing other persons, firms or corporations or the general public to become participating owners therein. Nothing herein shall prevent the ownership of stock in any such banking institution by an[y] person for investment purposes.

A 1972 Attorney General's Opinion was that this section did not "prohibit the ownership by a corporation, for investment purposes, of the controlling interest in a bank doing business in West Virginia." But the act prohibited purchasing or holding stock to perfect control of one or more banks. Bancorp acquired the stock to exercise control, and its owners were participating owners of the banks in apparent violation of the old statute.

Interpretations of statutes by bodies charged with their administration are given great weight. *New York Department of Social Services v. Dublino,* 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973); *Evans v. Hutchinson,* ____ W. Va. ____, 214 S.E.2d 453 (1975), Syllabus Point 7; *Detch v. Board of Education,* 145 W.Va. 722, 117 S.E.2d 138 (1960). The West Virginia Board of Banking & Financial Institutions, responsible for administering the pre-1975 law, found in 1973 that the former law prohibited formation of a bank holding company. The Ohio County Circuit Court reversed in *In Re: The Proposed W. D. Bank Co.,* but an appeal was mooted by the 1975 act.

Federal and state constitutional provisions about impairing obligations of contracts, U. S. Const. art. I, § 10 and W. Va. Const. art. III, § 4, are not absolute. States can preserve

community order, health, safety, morals and economic well-being, even though contracts are affected. *Manigault v. Springs,* 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274 (1905); *Home Building & Loan Ass'n. v. Blaisdell,* 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); *East New York Savings Bank v. Hahn,* 326 U.S. 230, 66 S.Ct. 69, 90 L.Ed. 34 (1945); *United States Trust Co. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92, *reh. denied,* 431 U.S. 975, 97 S.Ct. 2942, 53 L.Ed.2d 1073 (1977). The threshold inquiry is the severity of impairment of private contractual rights. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727, *reh. denied,* 439 U.S. 886, 99 S.Ct. 233, 58 L.Ed.2d 201 (1978).

State police power must be reasonably and necessarily imposed to accomplish a legitimate public purpose. *Home Building & Loan Ass'n. v. Blaisdell, supra; East New York Savings Bank v. Hahn, supra; United States Trust Co. v. New Jersey, supra; Allied Structural Steel Co. v. Spannaus, supra.* A legislature's discretion in deciding what is reasonable and necessary must be respected. *Manigault v. Springs, supra; East New York Savings Bank v. Hahn, supra; United States Trust Co. v. New Jersey, supra.* The power cannot be exercised to protect private interests, but rather basic societal interests. *Home Building & Loan Ass'n. v. Blaisdell, supra; Veix v. Sixth Ward Building & Loan Ass'n.,* 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061 (1940); *Allied Structural Steel Co. v. Spannaus, supra; Treigle v. Acme Homestead Ass'n.,* 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575 (1936). Our banking code was designed "to provide services to the public which are necessary and desirable for the economic, social and industrial health and development of the State." Code, 31A-1-1. So Code, 31A-8-12, is legislatively declared to be an exercise of police power to protect a basic societal interest. *See generally Farmers and Merchants Bank v. Federal Reserve Bank,* 262 U.S. 649, 43 S.Ct. 651, 67 L.Ed. 1157 (1923); *Timmons v. People's Trust Co.,* 114 W.Va. 618, 173 S.E. 79 (1934); 10 Am. Jur. 2d *Banks* § 10 (1963) (1963 and Supp.); 9 C.J.S. *Banks and Banking* § 5 (1938 and Supp.).

Regardless of whether old 31A-8-12(b) clearly proscribed multibank holding companies, it regulated and limited the

purchase and holding of bank stock. Bank stock ownership was subject to strict regulation, and all banking activities were, and are, heavily regulated. *See generally* W. Va. Code, Chapter 31A.

Even if a private contract predates a police power measure that affects it, there is no violation of the contract clause if parties were on notice about the possibility of future regulation. *Veix v. Sixth Ward Building & Loan Ass'n, supra.* Justice Reed wrote for a unanimous court in *Veix, supra* 310 U.S., at 38, 60 S.Ct. at 795:

> It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic. (Footnote omitted.)

These defendants, Bancorp and its banks, "contracted" subject to state and federal regulation. The "contract"[3] or charter of Bancorp to do business in this state is not impaired, because the object of its incorporation, as stated in its Articles of Incorporation, was only "[t]o have unlimited power to engage in and to do any lawful act or activity for which corporations may be organized under the laws of the State of West Virginia", and holding controlling shares of stock in two banks is not a lawful activity in West Virginia.

We must amend the trial court decree, however, to comport with the statute: Bancorp may own all of one bank, and less than 25 percent of the other.[4]

Affirmed.

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[3] There was no contract in evidence between Bancorp and its subsidiary banks.

[4] Arguments that plaintiffs were barred by laches, and that they should have proceeded against defendants administratively, *see Bank of Wheeling* v. *Morris Plan Bank & Trust Co.*, 155 W.Va. 245, 183 S.E.2d 692 (1971), were not made to the trial court and need not be considered here. *Mahoney* v. *Walter*, 157 W.Va. 882, 205 S.E.2d 692 (1974), Syllabus Point 1.

IN THE
Circuit Court of Ohio County, West Virginia

Civil Action
No. 77-C-897TA

SECURITY NATIONAL BANK & TRUST CO.,
a national banking association and
HALF DOLLAR TRUST AND SAVINGS BANK,
a corporation,
Petitioners

vs.

FIRST WEST VIRGINIA BANCORP, INC.,
a corporation,
FIRST WEST VIRGINIA BANK, N.A.—COMMUNITY,
a national banking association,
and
FIRST WEST VIRGINIA BANK, N.A.—WARWOOD,
a national banking association,
Defendants

MEMORANDUM OF OPINION

FACTS:

The defendant, First West Virginia Bancorp, Inc., is a bank holding company which owns one hundred percent (100%) of the stock of the two defendant banks, First West Virginia Bank, N.A.—Community and First West Virginia Bank N.A. —Warwood. Bancorp formation as a holding company was approved by the Federal Reserve on November 20, 1974, and Bancorp acquired the stock in the Community and Warwood Banks on January 30, 1975. The issues in the present case are:

(1.) Whether Chapter 31A, Article 8, §12(b), as it was in effect prior to the 1975 amendment, prohibited multi-bank holding companies.

(2.) Whether Chapter 31A, Article 8 §12(b) as amended in 1975, may constitutionally affect the defendant, Bancorp.

(3.) Whether Chapter 31A, Article 8, §12(b), as amended in 1975, was intended to affect pre-existing multi-bank holding companies.

OPINION:

(1) In regard to the first question, the statute in question prohibited branch banking. The two banks in question are separate and distinct corporations although owned by the same corporation. Neither bank professes to be a branch of the other except insofar as they accept business for any other bank.

Chapter 31A, Article 8, §12(b), prior to the 1975 Amendment to the West Virginia Code, provided as follows:

> "(b) It shall be unlawful for any person to purchase and hold stock in any banking institutions for the purpose of selling, negotiating, or trading participation in the ownership thereof, either for the purpose of perfecting control of one or more such banking institutions or for the purpose of inducing other persons, firms, or corporations or the general public to become participating owners therein. Nothing herein shall prevent the ownership of stock in any such banking institution by any person for investment purposes."

The language of the statute in question specifically declares unlawful "to purchase and hold stock in any banking institution *for the purpose of selling, negotiating, or trading participation in the ownership thereof...*", but permitted the purchase of stock in banking institution *for investment purposes.* The statutes prior to 1975 did not, therefore, prohibit bank holding companies which were formed for investment purposes only, but such companies could not have, as a purpose, the selling, negotiating, or trading participation. The Court is of the

opinion that the defendants did not violate Chapter 31A, Article 8, §12(b), as it was in effect prior to the 1975 Amendment.

(2) In regard to the second issue, the Amendment provides in part, as follows:

> "It shall be unlawful for any... private corporation... to directly or indirectly, own, control, or hold with power to vote, twenty-five percent or more of the voting shares of each of two or more banks..."

The language of the statute is quite clear. It is now unlawful for any corporation to own twenty-five percent or more of the voting shares of two or more banks. The new statute places severe limitations on bank holding companies.

(3) In regard to the third question dealing with the power of the Legislature to act retroactively in regard to corporations, the West Virginia Constitution in Article XI, §1 provides "the legislature shall provide for the organization of all corporations hereinafter created, by general law, uniform as to the class to which they relate..." The corporation is a creature of the legislature and its franchise or charter is a contractual right between the corporation and the state creating it. The legislature has the power, subject to Constitutional restrictions, to prescribe conditions under which a corporation may operate and to control and alter the rules governing corporations and powers conferred upon the corporations. The only limitations upon the legislature are imposed by the federal and state constitutions.

Bancorp owns one hundred (100) percent of the stock of both defendant banks, and the bank, although chartered as national banks, are subject to the restrictions of the state laws wherein they conduct business as long as such law does not conflict with a federal purpose. In Hanshaw vs. Day, 200 Va. 818, 120S.E.2d 460 (1961), the Court held the legislature may exercise its police power over corporate bodies to supervise, regulate, and limit corporate functions by appropriate changes. The West Virginia Legislature has determined that it is harmful

to public interest for a corporation to hold more than twenty-five (25) percent of the stock of two or more banks. The prohibition applies to all corporations and is a proper exercise of the regulating power of the state.

Such regulation does not violate the federal constitution. In Veix vs. Sixth Ward Build and Loan, 310 U.S.32, 84L Ed.1061 (1940), the Supreme Court held:

> "It was while statutory requirements were in effect that the petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further regulation upon the same topic. . ."

and

> "The power of the state to protect its citizens by statutory enactments affecting contract rights, without a violation of the contract clause of the Constitution is analogous to the power often reserved to amend its charters."

The Court is of the opinion that the defendant holding company purchased the stock of the defendant banks knowing such purchase was subject to change in the law governing stock ownership. After the effective date of the amended statute, Bancorp could not lawfully continue its present percentage ownership in the two defendant banks. The Court is, therefore, of the opinion that the defendant, Bancorp, must divest itself of the shares in one defendant bank or seventy-five (75) percent of the shares of both defendant banks in order to bring itself into compliance with Chapter 31A, Article 8, §12(b) of the West Virginia Code as amended.

An order may be prepared in accordance with the Memorandum of Opinion, saving unto the defendants their exceptions to the ruling of the Court. The Order should further require the defendant, Bancorp, to bring itself into compliance with the statute within six months from the date of the Order. The Court realizes that the defendants have the intent to appeal the

Court's decision, and upon proper application, a stay of execution will be awarded upon proper terms and conditions.

Dated the 17th day of October, 1979.

ENTER:

/s/ FLOYD K. FARR

Judge

IN THE

United States District Court
For the Northern District of West Virginia

Civil Action
No. 78-0001-W(H)

SECURITY NATIONAL BANK & TRUST CO., *et al,*
Plaintiffs,

vs.

FIRST WEST VIRGINIA BANCORP, INC., *et al,*
Defendants.

MEMORANDUM OPINION AND ORDER

Presently pending before the Court is Plaintiffs' motion seeking remand of this action to the originating forum, the Circuit Court of Ohio County, West Virginia, on the ground that removal was improvident and that this Court is without subject matter jurisdiction. The Defendants likewise question the jurisdiction of this Court in their motions for judgment on the pleadings and to dismiss for lack of subject matter jurisdiction.[1] In any event, the first order of business for this Court is to determine for itself whether it has subject matter jurisdiction of the cause. 28 U.S.C. §1447(c); 1A Moore's *Federal Practice* ¶0.169[1], p. 557.

All parties to this litigation are in agreement that a federal district court and the states courts are not empowered to review

[1] Curiously, the Defendants initially alleged subject matter jurisdiction in this Court as a basis for removal to the federal forum. See, Removal Petition ¶4 and 5. Although one may question the tactical *bona fides* of the Defendants, there is no doubt the removing party later may question subject matter jurisdiction of the federal court. See *American Fire & Cas. Co. v. Finn,* 341 U.S. 6 (1951).

orders and regulations of the Federal Reserve Board under the Bank Holding Company Act of 1956, 12 U.S.C. §1841, *et seq.* This Court agrees. A petition to the appropriate federal Court of Appeals is the exclusive means for direct review of action done pursuant to this statute and, even then, administrative remedies exhaustion is a condition precedent to judicial review. *Bank of Commerce v. Smith,* 513 F.2d 167 (10th Cir. 1975); *First National Bank v. Board of Governors,* 509 F.2d 1004 (8th Cir. 1975); *Investment Co. Institute v. Board of Governors,* 398 F.Supp. 725 (D. D.C. 1975) aff'd. 551 F.2d 1270 (DC Cir. 1977). Obviously, this Court lacks subject matter jurisdiction and must either remand or dismiss the action.

Assuming, *arguendo,* that Congress preempted the field of banking regulation, it might be appropriate to consider dismissal of this action, thus to keep it from being returned to a state forum which had no jurisdiction. Such, however, cannot be countenanced here since Congress has preserved, explicitly, unto the States the right and power of dual regulation of business conducted by national banks or bank holding companies within the borders of the state jurisdiction. 12 U.S.C. §1846. *American Trust Co. Inc. v. South Carolina State Board of Bank Control,* 381 F.Supp. 313 (D.C. S.C. 1974) (three-judge court). Thus, this Court has no constitutional authority to conclude the question of state jurisdiction.[2]

It is the finding of this Court that this case was removed improvidently and without jurisdiction.

Accordingly, Plaintiffs' motion is granted. It is, therefore, ORDERED that this case be remanded to the Circuit Court of Ohio County, West Virginia, and that the costs of this action be assessed against the Defendants.

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[2] West Virginia apparently has chosen to exercise the authority to regulate banking practices also regulated by the federal government through legislative prohibition of "branch banking". See *W. Va. Code,* 1931, 31A-8-12, as amended. *Bank of Wheeling v. Morris Plan Bank & Trust Co.,* 155 W. Va. 245, 183 S.E.2d 692 (1971).

The Clerk is directed to mail a certified copy of this order of remand to the Circuit Clerk of Ohio County, West Virginia, and all counsel of record.

ENTER: 10/19/78

/s/ CHARLES H. HADEN II

Charles H. Haden II
United States District Judge

IN THE
Supreme Court of Appeals of West Virginia

Appeal No. 14938

Civil Action No. 77-C-897

SECURITY NATIONAL BANK & TRUST CO., a national banking association, and HALF DOLLAR TRUST AND SAVINGS BANK, a corporation,

Appellees,

v.

FIRST WEST VIRGINIA BANCORP., INC., a corporation, FIRST WEST VIRGINIA BANK, N.A.—COMMUNITY, a national banking association, and FIRST WEST VIRGINIA BANK, N.A.—WARWOOD, a national banking association,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that First West Virginia Bancorp, Inc., First West Virginia Bank, N.A.—Community, and First West Virginia Bank, N.A.—Warwood, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of West Virginia, affirming the decision of the Circuit Court of Ohio County, West Virginia, entered in this action on May 5, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

FIRST WEST VIRGINIA BANCORP, INC.
FIRST WEST VIRGINIA BANK, N.A.—
COMMUNITY
FIRST WEST VIRGINIA BANK, N.A.—
WARWOOD

By: BENEKE & BREMER

/s/ GEORGE F. BENEKE

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Counsel For Petitioners

Dated 29th day of July, 1981.

FEDERAL RESERVE SYSTEM

FIRST WEST VIRGINIA BANCORP, INC.

Order Approving Formation of a Bank Holding Company

First West Virginia Bancorp, Inc., Wheeling, West Virginia ("Applicant"), has applied for approval of the Board of Governors of the Federal Reserve System, under Section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. §1842(a)(1)), of the formation of a bank holding company through acquisition of all of the voting shares (less directors' qualifying shares) of the successors by merger to The Bank of Warwood, National Association ("Warwood Bank"), and the Community Savings Bank, National Association ("Community Bank"), both located in Wheeling, West Virginia. The banks into which Warwood Bank and Community Bank are to be merged have no significance except as a means to facilitate the acquisition of the voting shares of Warwood Bank and Community Bank. Accordingly, the proposed acquisition of shares of each of the successor organizations is treated herein as the proposed acquisition of shares of Warwood Bank and Community Bank.

Notice of the application, affording opportunity for interested persons to submit comments and views, has been given in accordance with Section 3(b) of the Act. The time for filing comments and views has expired, and the Board has considered the application and all comments received in light of the factors set forth in Section 3(c) of the Act (12 U.S.C. § 1842(c)).

Applicant, a newly organized corporation with no operating history, was organized for the purpose of becoming a bank holding company. The two banks to be acquired have aggregate deposits of $19.2 million, representing less than five-tenths of one percent of the total deposits in commercial banks in West Virginia. Upon consummation of the proposal, Applicant would become the 62nd largest banking organization in the State.

Warwood Bank (deposits of $13.9 million) and Community Bank (deposits of $5.3 million)[1] are each located in the Wheeling banking market (which is approximated by Ohio County and the northern half of Marshall County in West Virginia and the eastern part of Belmont County in Ohio). Warwood Bank is the eleventh largest of eighteen banking organizations competing in the Wheeling banking market with 3.3 per cent of the total commercial bank deposits in that market and Community Bank ranks sixteenth with 1.3 percent of the market deposits. Upon consummation of the proposed transaction, Applicant would become the eighth largest banking organization in the market with 4.6 percent of the market deposits.

While Warwood Bank and Community Bank are located in the same banking market, it appears that the amount of meaningful competition that would be eliminated is not significant in view of some common stock ownership of the two banks. On the contrary, approval of the proposal may have a salutary effect on competition since Applicant would be able to compete more effectively with the four largest banks in the market which hold, in the aggregate, approximately 50 per cent of market deposits. On the basis of the facts of record, including the overlapping ownership of the two banks and the relatively small share of market deposits that will be held by Applicant, the Board concludes that consummation of the proposal would neither eliminate any significant existing or potential competition nor would it increase the concentration of banking resources in the relevant market or in the State as a whole. Therefore, competitive considerations are consistent with approval of the application.

The financial and managerial resources and future prospects of Applicant are dependent upon those of banks to be acquired which are considered to be satisfactory. Moreover, Applicant should be able to raise additional capital more readily, should the need arise, than either bank would be able to raise individually. Accordingly, considerations relating to the banking factors are consistent with approval of the application.

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[1] All banking data are as of December 31, 1973.

Affiliation with Applicant would enable the two banks to broaden existing services and to offer new services. These would include an installation of a new drive-in facility for Community Bank and an allocation of funds to be used for real estate mortgage loans by Warwood Bank. Thus, factors relating to the convenience and needs of the community to be served are consistent with approval of the application. It is the Board's judgment that the proposed transaction would be consistent with the public interest and that the application should be approved.

On the basis of the record, the application is approved for the reasons summarized above. The transaction shall not be made (a) before the thirtieth calendar day following the date of this Order, or (b) later than three months after the effective date of this Order, unless such period is extended for good cause by the Board, or by the Federal Reserve Bank of Cleveland pursuant to delegated authority.

By order of the Board of Governors,[2] effective November 20, 1974.

/s/ THEODORE E. ALLISON

Theodore E. Allison
Secretary of the Board

[2] Voting for this action: Vice Chairman Mitchell and Governors Sheehan, Bucher, Holland, Wallich and Coldwell. Absent and not voting: Chairman Burns.

IN THE
Circuit Court of Ohio County, West Virginia

Civil Action
No. 77-C-897TA

SECURITY NATIONAL BANK & TRUST CO.,
a national banking association and,
HALF DOLLAR TRUST AND SAVINGS BANK,
a corporation,
Petitioners,

v.

FIRST WEST VIRGINIA BANCORP, INC.,
a corporation,
FIRST WEST VIRGINIA BANK, N.A.—COMMUNITY,
a national banking association, and
FIRST WEST VIRGINIA BANK, N.A.—WARWOOD,
a national banking association,
Defendants.

AFFIDAVIT

Ronald L. Solomon, being duly sworn according to law, deposes and says as follows:

1. I am currently, and have been since July 1, 1978, President and Chief Executive Officer of First West Virginia Bancorp ("Bancorp"), First West Virginia Bank, N.A.—Community ("Community Bank"), and First West Virginia Bank, N.A.—Warwood ("Warwood Bank"). Bancorp, Community Bank, and Warwood Bank are located in Wheeling, West Virginia.

2. Bancorp is a bank holding company, registered as such with the Board of Governors of the Federal Reserve System ("Board of Governors"). It owns all of the outstanding voting shares (except directors' qualifying shares) of Community Bank and Warwood Bank. Bancorp was formed in 1974, with the approval of the Board of Governors, in order to combine ownership of Community and Warwood in a single corporation. An important purpose of the consolidation was to improve the managerial, financial and competitive capabilities of the banks by combining their resources under a holding company that could act as a source of strength to both. It was on this basis that the required approvals were sought and obtained from the Board of Governors and from the Comptroller of the Currency ("Comptroller").

3. The passage of five years has substantially borne out the purposes of the combination. Both banks have made significant advances, and are stronger today than they were in 1974, as a direct result of their acquisition by Bancorp. This strengthening has been reflected in more efficient management, greater financial resources and, perhaps most importantly, increased ability to compete with the larger banking institutions in the Wheeling market, such as the plaintiffs in this action. In my opinion, these gains would be negated and both banks would be weakened if Bancorp were required to divest its control of either or both of the banks. In addition, banking customers in the Wheeling market would be deprived of the increased competition that has resulted from the acquisition. Indeed, Community Bank would not have the strength to compete significantly in the market if it were to be divested.

4. The banking business in Wheeling is highly concentrated, dominated by banks much larger than the combined resources of Community and Warwood. Of the eight banks located within the city limits, which is the primary area of competition, three control 63% of the total assets and five control over 90%. By contrast, the Community and Warwood Banks are sixth and eighth largest, with a combined share of only 5.8%. Warwood has 4% of the total assets and Community, which is by far the smallest bank in Wheeling, has 1.8%.

The following table lists, for each of the eight banks, their total assets as of December 31, 1978, in dollar amounts and as a percentage of the aggregate:

	Name of Bank	Total Assets as of 12/31/78 Dollar Amount (in millions of dollars)	Total Assets as of 12/31/78 Percent of Combined Assets
1.	Wheeling Dollar Savings & Trust	134.4	29.3%
2.	Security National Bank	78.6	17.1%
3.	Wheeling National Bank	78.2	17.0%
4.	First National Bank of Wheeling	71.0	15.5%
5.	Half Dollar Bank	54.6	11.9%
6.	First W. Va. Bank, N.A. —Warwood	18.5	4.0%
7.	Bank of Wheeling	16.2	3.5%
8.	First W. Va. Bank, N.A. —Community	7.4	1.8%

As this table demonstrates, the strength that Community Bank and Warwood Bank derive from Bancorp is vital to their effective competition in the Wheeling banking market.

5. As President and Chief Officer of Bancorp, Community Bank, and Warwood Bank, I am a key participant in all major decisions relating to the operations of Bancorp and the two banks. In particular, I am solely responsible for the purchasing and selling of securities for both banks. If I were required to resign from one bank because of a compelled divestiture, it would disrupt the handling of the banks' security portfolios and seriously interfere with overall operations.

6. The senior management of Bancorp, Community Bank, and Warwood Bank is substantially interdependent in other positions as well. For example, Eugene Singer is Secretary of each, a Vice-President of Bancorp, a Vice-President of Community Bank, and is in charge of operations for Bancorp and both banks. Charles Graham is a Vice-President of Bancorp, and Executive Vice-President of Community Bank, and is in charge

of loans for Bancorp and both banks. James Davis serves as Auditor for Bancorp and both banks. If these individuals were required to resign from or terminate their relationships with one or the other bank, it would have a serious and prolonged adverse effect on their areas of responsibility. Such resignations and terminations of relationships would create a period of management confusion and inefficiency and would seriously threaten the competitive ability and financial stability of one or both banks.

7. Bancorp's board of directors is a further source of unified management strength. Each of the fifteen directors of Bancorp also serves as a director for either Community Bank or Warwood Bank; George Beneke and I serve as directors for all three organizations. The three committees of Bancorp—Budget and Marketing, Audit, and Executive—also serve on behalf of both banks, providing a common core of knowledge and guidance. In addition, the two separate bank boards now hold their meetings jointly within the Bancorp board. Thus, all directors work together to promote the growth of both banks. This has proven particularly important with respect to the recently relocated Community Bank, which was helped greatly in attaining local acceptance through the Warwood directors. In my view, a forced divestiture would adversely affect both banks for years to come by depriving the banks of the strengthened management resources that were a primary purpose of the acquisition. As a result, the growth prospects and competitive vigor of both banks would be impaired.

8. A forced divestiture would significantly increase overhead costs. The combination of the two banks under Bancorp has permitted more efficient utilization of personnel and joint services with resultant substantial cost savings. For example:

—Check processing operations for both banks are presently being handled at Warwood Bank. This has resulted in savings in equipment costs and personnel for each bank.

—Bookkeeping operations are also done jointly at Warwood Bank, permitting savings in small support equipment, mailing and supply costs, and personnel.

—The two banks advertise jointly at a tremendous cost savings. All advertising is done in the name of both banks; therefore both benefitted from joint 1979 advertising expenditures of more than $35,000. Additional joint advertising activity is contemplated through the hiring of a marketing representative to coordinate all advertising and customer contracts. Apart from cost reductions, such common advertising has resulted in widespread public identification of the banks as related entities. I believe the public has come to rely upon the relationship between the two banks as an indication of their strength. This common identification would be destroyed by divestiture, causing real competitive harm to both banks.

—Computer operations for both banks are handled through a single correspondent bank. By negotiating jointly, cost reductions were realized for each.

—Equipment and working supplies are purchased jointly at great savings over the cost of separate purchase. Similarly, disbursement of payments for almost all expenses of both banks is handled by Warwood Bank, resulting in a savings in personnel costs and, equally important, in tighter controls on expenditures.

—By combining their total personnel, the banks have been able to offer a wider range of insurance benefits—hospitalization, increased life, fully paid pension—to their employees at substantially reduced costs. The same is true for blanket bond insurance and fire hazard insurance, which is purchased by the holding company for both banks at premiums that are lower than each could realize separately.

—Community Bank is the smallest bank in the Wheeling market, with only 11 employees. Warwood Bank has been able to provide personnel support to Community Bank to cover vacations, extended sick periods and operational problems, thereby saving on additional personnel and overtime costs.

Divestiture would eliminate these important gains and would cause substantial disruption to the operations of the bank.

9. From a financial standpoint, the two banks have been greatly strengthened through their affiliation with Bancorp. Because of that affiliation, each bank may now originate loans in amounts as large as the combined maximum lending limits of both. As a result, the banks have been able to serve the needs of a number of important customers whose borrowing requirements would have exceeded their separate lending limits. For example, the banks to date have participated jointly in $3,247,000 in loans. Several additional loans are contemplated this year that will also depend upon the combined financial strength. As the original bank holding company application predicted, Bancorp has thus become a more effective competitor for banks such as the plaintiffs, who enjoy higher lending limits. The continued patronage of larger customers, as well as the competitive position of the two banks, would be in jeopardy in the event of divestiture. It is my judgment that neither of the two banks on its own is of sufficient size to be an effective competitor with the other banks in the Wheeling area.

10. The increased competitive capability of Community and Warwood has been reflected in their recent growth. From 1973 through 1977, the compounded annual growth rate in total deposits for Community Bank was 0.5%, far below the growth rate of all other banks in Wheeling. In an effort to improve its growth prospects, Bancorp relocated Community Bank from downtown Wheeling to its present suburban location on January 1, 1978. Since that time, Community Bank's deposit growth rate has risen significantly; it was 16.8% in 1978 and 24.7% in 1979. With the continued support of Bancorp, as reflected in the various factors discussed above, I expect Community Bank to show a profit next year for the first time since the move. I believe that with the strength it has gained through Bancorp, Community Bank has now become a viable competitive institution in Wheeling. Without that support, I seriously question whether Community could have continued in business as a separate bank.

11. Next to Community Bank, Warwood Bank had the slowest deposit growth rate—4.0%—of all banks in the Wheeling area during the period from 1973 through 1977. In 1978 and 1979, it too has begun to grow far in excess of preceding

years. Its deposit growth in 1979 was 7.1%. Again, it is my view that this improvement is substantially attributable to the strength afforded Warwood Bank through Bancorp.

/s/ RONALD L. SOLOMON

Ronald L. Solomon

Sworn to and subscribed before me
this 8th day of April, 1980.

/s/ PAULINE ARCHER

Notary Public

IN THE
Circuit Court of Ohio County, West Virginia

Civil Action
No. 77-C-897TA

SECURITY NATIONAL BANK & TRUST CO.,
a national banking association and
HALF DOLLAR TRUST AND SAVINGS BANK,
a corporation,
Petitioners,

vs.

FIRST WEST VIRGINIA BANCORP, INC.,
a corporation,
FIRST WEST VIRGINIA BANK, N.A.—COMMUNITY,
a national banking association, and
FIRST WEST VIRGINIA BANK, N.A.—WARWOOD,
a national banking association,
Defendants.

AFFIDAVIT OF PAUL M. HOMAN

Paul M. Homan, being duly sworn, deposes and says as follows:

1. I am Senior Deputy Comptroller for Bank Supervision, directly responsible to the Comptroller of the Currency of the United States. My responsibilities include oversight and supervision of multinational and international banking, specialized examinations of trust and electronic data processing functions performed by national banks, special surveillance of national banks in need of closer supervision and all functions performed by the Comptroller's Chief National Bank Examiner, which include commercial examination authority over all national

banks. I have read this Court's Order of October 17, 1979, in this matter, as well as the defendants' motion for reconsideration of that Order, and I am authorized to make this affidavit in connection with that motion.

2. The Office of the Comptroller of the Currency and our system of national banks were created by the National Currency Act of 1863 and the National Bank Act of 1864. Under these Acts, and subsequent amendments thereto, the Comptroller has broad authority to charter national banking associations. In issuing such charters, the Comptroller is not subject to any limitation in state laws with respect to the organization or location of banks. The Comptroller has sole authority to determine the need for a new national bank at any proposed location, to assess the adequacy of its initial capital and its future earnings prospects, and to evaluate the character and ability of its proposed management. National banks are not subject to regulation, supervision or examination by state banking authorities.

3. The Change in Bank Control Act (12 U.S.C. §1817(j)) authorizes the Comptroller to disapprove an acquisition of control of a national bank on certain specified grounds. Otherwise, federal law and regulations impose no restrictions on who may be a shareholder of a national bank. However, the Comptroller exercises substantial supervision over the control of national banks. In the process of considering applications for new charters, the Comptroller carefully scrutinizes the financial and business background of not only the organizers of a proposed new national bank, but also of those persons who will own five percent or more of the bank. In addition, the Comptroller routinely reviews the initial list of subscribers to the initial stock of a new national bank before issuing a charter. The purpose of these inquiries is to enable the Comptroller to determine that the persons who will control the new bank possess the requisite integrity, ability and financial strength necessary to ensure the health of the bank.

4. After a charter has been issued, the Comptroller has broad authority under the Change in Bank Control Act of 1978, 12 U.S.C. §1817(j), and regulations issued pursuant thereto,

(*see* 44 F.R. 7119, February 6, 1979, to be codified as Part 15 to Title 12 of the Code of Federal Regulations), to pass upon proposed changes in control of a national bank, including transfers of stock in a national bank involving as little as 10 percent of the bank's total outstanding stock.

5. As indicated in the opinion letter of the Comptroller's Chief Counsel dated October 2, 1979, attached as Exhibit A to defendants' Motion, the Comptroller considers his powers and prerogatives with respect to the ownership and control of national banks to be essential to his ability to carry out his responsibilities for administering the national banking system. The Comptroller's authority to determine who may control a new national bank, and to whom control may be transferred, is of particular importance to his ability to administer the system of national banks because of the impact that a controlling shareholder can have upon the health, stability and competitive effectiveness of a national bank.

6. Because a change in the control of a national bank could threaten to weaken the bank by diminishing its financial and managerial resources and by reducing its effectiveness as a competitor, the Comptroller believes that a state law or regulation that would have the effect of forcing a change in the control of a national bank could encroach upon his authority and prerogatives, and could impede his ability to administer the national banking system. In particular, for a state to assert the power to require a controlling shareholder of a national bank to divest that control, where the control relationship has been expressly approved by the Comptroller and was wholly lawful at the time it was so approved, would imply a degree of state authority over the operation of national banks that is fundamentally inconsistent with federal authority in this area.

7. In the case presently before this Court, the Comptroller expressly approved the reorganization of the predecessors of First West Virginia Bank, N.A.—Community and First West Virginia Bank, N.A.—Warwood into subsidiaries of First West Virginia Bancorp, Inc. In the opinion of the Comptroller's

Office, the West Virginia statute at issue in this case should not be applied retroactively in such a way as to force a divestiture of control of these two national banks.

Dated: 4/3/80

/s/ PAUL M. HOMAN

Paul M. Homan
Senior Deputy Comptroller for Bank Supervision

SUBSCRIBED AND SWORN TO BEFORE ME this 3rd day of April, 1980.

/s/ BARBARA A. SMITH

Notary Public
My Commission Expires:
12/14/81

Motion to Dismiss or Affirm

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No. 81-219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FIRST WEST VIRGINIA BANCORP, INC.,
FIRST WEST VIRGINIA BANK, N.A.-COMMUNITY, AND
FIRST WEST VIRGINIA BANK, N.A.-WARWOOD,
Appellants,

v.

SECURITY NATIONAL BANK & TRUST CO., AND
HALF DOLLAR TRUST AND SAVINGS BANK,
Appellees.

On Appeal From The Supreme Court Of Appeals Of West Virginia

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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FIRST WEST VIRGINIA BANCORP, INC.,
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SECURITY NATIONAL BANK & TRUST CO., AND
HALF DOLLAR TRUST AND SAVINGS BANK,
Appellees.

On Appeal From The Supreme Court Of Appeals Of West Virginia

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Pursuant to Rule 16(1)(b) and (d) of the Rules of the Supreme Court, the appellees, Security National Bank & Trust Co. and Half Dollar Trust and Savings Bank, respectfully move to dismiss or affirm the judgment of the Supreme Court of Appeals of West Virginia on the ground that it does not present a substantial federal question and that the decision below is so obviously correct as to warrant no further review.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 277 S.E.2d 613. The opinion of the Circuit Court of Ohio County, West Virginia, and the

memorandum opinion and order of the United States District Court for the Northern District of West Virginia, are not reported, and are reprinted in the appendix to the appellants' jurisdictional statement at pages 8a and 13a, respectively.

STATUTES INVOLVED

West Virginia Code § 31A-8-12(b):

> "It shall be unlawful for any individual, partnership, society, association, firm, institution, trust, syndicate, public or private corporation, or any other legal entity, or combination of entities acting in concert, to directly or indirectly own, control or hold with power to vote, twenty-five percent or more of the voting shares of each of two or more banks, or to control in any manner the election of a majority of the directors of two or more banks: Provided, however, that it shall be unlawful for any financial institution, as defined in subsection (j), section two (§ 31A-1-2), article one of this chapter, or any other financial organization having similar purposes as those specifically mentioned in said subsection (j) to directly or indirectly own, control or hold with power to vote, twenty-five percent or more of the voting shares of any one or more banks, or to control in any manner the election of a majority of the directors of any one or more banks, but the foregoing provisions of this provision shall not apply to shares held by a financial institution in a fiduciary capacity. It is further specifically provided that nothing herein contained shall in anywise affect the ownership or control of financial institutions other than banks and banking institutions as defined in subsection (b), section two, article one of this chapter."

Title 12, United States Code § 1846:

> "The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such

powers and jurisdiction which it now or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof."

STATEMENT OF THE CASE

The statement of the case presented by the appellants in their jurisdictional statement contains two glaring inaccuracies. On page 5 of the jurisdictional statement, Bancorp claims to have filed a timely motion for reconsideration with attached affidavits with the Circuit Court of Ohio County. On page 7, the appellants state that the circuit court denied Bancorp's motion for reconsideration without a written opinion.

In fact, the motion for reconsideration was not timely filed, nor did the circuit court ever formally rule on the motion. While this may appear to be picayune to this Court, the importance of this distinction is that those documents appended to the motion for reconsideration were not considered by the circuit court. These documents include the Order Approving Formation of a Bank Holding Company, Affidavit of Ronald L. Solomon, and Affidavit of Paul M. Homan, all three of which are contained in appellants' appendix (pp. 18a-31a) and from which most of appellants' statement of the case is derived.

Basically the facts upon which the Circuit Court of Ohio County relied in making its ruling are as follows:

First West Virginia Bancorp, Inc. is a West Virginia corporation owning 100 percent of the shares of stock, except directors qualifying shares, of both First West Virginia Bank, N.A.-Community and First West Virginia Bank, N.A.-Warwood, national banking associations. First West Virginia Bancorp, Inc. was approved as a bank holding company by the Board of Governors of the Fed-

eral Reserve on November 20, 1974, and Bancorp acquired the stock in Community and Warwood on January 30, 1975.

ARGUMENT

The appellants contend that the West Virginia law forbidding bank holding companies, West Virginia Code § 31A-8-12(b), creates a burden upon the national banking system which is impermissible in light of the supremacy clause of the Constitution. The appellees do not question that the Congress possesses the Constitutional authority to totally preempt the field of regulation of national banks. The fact is, however, that Congress did not choose to exercise that authority, but rather specifically reserved to the states a dual authority.

Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846, provides that:

> "The enactment by Congress of this Chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof."

This statute clearly indicates that there is no federal preemption in this area and that Congress specifically authorized the states to place upon and enforce against bank holding companies such restrictions as they may deem appropriate. *See Whitney National Bank* v. *Bank of New Orleans,* 379 U.S. 411 (1965).

That Congress envisioned a dual regulatory structure is demonstrated by the legislative history of the 1956 Act:

> "In any event, another provision of this bill expressly preserves to the States a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders

> than the Federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill. In the opinion of the committee, this provision adequately safeguards States' rights as to bank holding companies." 1956 U.S. Code Cong. & Admin. News, 84th Cong. 2nd Sess., p. 2492.

This history clearly shows that Congress reserved to the states the right to be more stringent in regulation of bank holding companies than the federal authorities actually are in practice. This right has been explicitly affirmed by a lower federal court in this very case. After the filing of this case, the appellants removed the action to the United States District Court for the Northern District of West Virginia. There, they moved to dismiss the action on the ground that regulation of national banks was limited to the federal authorities.

In his memorandum opinion and order remanding the case to the Circuit Court (R. 22.), Judge Haden stated:

> "Assuming, *arguendo,* that Congress preempted the field of banking regulation, it might be appropriate to consider dismissal of this action, thus to keep it from being returned to a state forum which had no jurisdiction. Such, however, cannot be contenanced here since Congress has preserved, explicitly, unto the states the right and power of dual regulation of business conducted by national banks or bank holding companies within the borders of the state jurisdiction. 12 U.S.C. § 1846, *American Trust Co., Inc.* v. *South Carolina State Board of Bank Control,* 381 F.Supp. 313 (D.S.C. 1974) (three-judge court)."

Finally, this state authority to regulate bank holding companies was expressly recognized by the United States Supreme Court in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

This regulatory power preserved to the states include the power to prohibit bank holding companies, federal or state. In *Grandview Bank & Trust Co.* v. *Board of Governors,* 550 F.2d 415 (8th Cir.), *cert. denied,* 434 U.S. 821 (1977), the Eighth Circuit stated:

> "Congress was well aware at the time of the Bank Holding Company Act that many of the operations of a BHC would simulate branch banking. In passing this legislation (12 U.S.C. § 1846), Congress made it possible for each state to exercise a veto over BHCs in the same manner that it has passed restrictive legislation covering branch banking." 550 F.2d at 519-20.

That passage of the Bank Holding Company Act of 1956 did not diminish a state's ability to restrict and regulate bank holding companies was also alluded to in *American Trust Company, Inc.* v. *South Carolina State Board of Bank Control,* 381 F.Supp. 313 (D.S.C. 1974) (three-judge court).

The appellants further contend that any application of the 1975 amendment to West Virginia Code § 31A-8-12(b) to them constitutes impermissibly retroactive legislation. This is actually a misnomer. The legislation is not retroactive, but only prospective, applying to all banks from the time of passage forward.

The real issue is whether requiring the appellants to comply with the section unconstitutionally interferes with any vested rights that they may have acquired prior to the enactment of the amendment.

Several cases establish that such an enactment is authorized under the states' police power and that banks, as a regulated industry, have no vested rights of this nature.

The first of these cases was cited in the appellants brief in opposition to summary judgment in circuit court, *Veix* v. *Sixth Ward Building and Loan Association,* 310 U.S. 32 (1940). In *Veix,* a New Jersey man invested in prepaid shares of the Building and Loan Association in 1928 and 1929. In 1932 and 1935, the New Jersey Legislature amended the statutes governing these shares and placed a number of restrictions on the withdrawal of the same. Veix challenged these amendments insofar as they affected his investment under the contract clause of the Constitution. The court upheld the amendments, stating:

> "With institutions of such importance to its economy, the State retains police powers adequate to authorize the enactment of statutes regulating the withdrawal of shares. Unquestionably for the future, the provisions of the 1932 Act would be effective. We think they were equally effective as to shares brought prior to the enactment of the statute, notwithstanding the provisions of Article 1, § 10 of the Constitution that 'No State shall . . . pass any . . . Law impairing the obligation of contracts. . . .' This is so because the obligation of the Association to respond to the application for withdrawal was subject to the paramount police power. Beginning with the 1903 Act the State of New Jersey has laid down specifically by statute the requirements for withdrawal. The charter, by-laws and membership certificate ceased to determine withdrawal rights. . . . It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.

> "In Home Bldg. & L. Asso. v. Blaisdell this Court considered the authority retained by the state over contracts 'to safeguard the vital interests of its people.' The rule that all contracts are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety. It extends to economic needs as well. Utility rate contracts give way to this power, as do contractual arrangements between landlords and tenants.
>
> . . .
>
> "The power of the state to protect its citizens by statutory enactments affecting contract rights, without a violation of the contract clause of the Constitution is analogous to the power often reserved to amend charters." *Veix*, 310 U.S. at 38-40 (footnotes omitted).

Appellees contend that *Veix* is directly on point. The prior West Virginia statute which was amended in 1975 also regulated who could purchase and hold stock in banks in West Virginia. Accordingly, the appellant holding company purchased stock in the appellant banks subject to changes in the laws governing the ownership of such stock.

Before the Ohio County Circuit Court, the appellants attempted to distinguish *Veix* on two grounds; first, that *Veix* dealt only with procedure and not with the substantive rights of ownership, and, second, that the existence of an emergency situation casts doubt on its precedential value. As to the first argument, a reading of the case discloses that, under the amended law, in some circumstances, withdrawals of shares are prohibited. Surely, this affects substantive rights, appellants' claim that the emergency situation casts doubt on the precedential value of *Veix* is totally without merit. The court stated:

> "The cases cited in the preceding paragraph make repeated reference to the emergency existing at the

> time of the enactment of the questioned statutes. . . . So far as the contract clause is concerned, is this significant? We think not. 'Emergency does not create (constitutional) power, emergency may furnish the occasion for the exercise of power.'" *Veix*, 310 U.S. at 39.

Home Building & Loan Association v. *Blaisdell*, 290 U.S. 398 (1934), cited by the court in *Veix*, provided a basis for the ruling. In *Blaisdell*, the court held that the economic interests of a state may justify the exercise of its protective power notwithstanding interference with existing contracts.

Another case dealing with this issue is *Fahey* v. *O'Melveny & Myers*, 200 F.2d 420 (9th Cir. 1952), dealing with the rights of stockholders in a Federal Home Loan Bank. The Ninth Circuit held that:

> "Since, as we later indicate, a Federal Home Loan Bank is a federal instrumentality organized to carry out public policy and its functions are wholly governmental, neither the bank nor its association members, although they are normally stockholders, acquire under the provisions of the Bank Act, any vested interest in the continued existence of said bank or any legally protected private rights which would enable them to invoke the due process clause." 200 F.2d at 447.

In this case, the holding company is the stockholder of a national banking association. As noted above, it has no legally protected right to continue as such.

The final case which the appellees wish to call to this Court's attention is *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), in which the Supreme Court upheld a Maryland statute requiring all oil producers and refiners to divest themselves of company operated service stations and requiring that all service stations in the state be

independently operated. While not dealing with the banking industry, this case demonstrates that legislation enacted in the public interest may operate to affect ownership rights.

Accordingly, requiring the appellants to comply with the law does not disturb any vested rights and does not offend the contract clause of the Constitution.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

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Appellant's Reply Brief

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No. 81-219

IN THE

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On Appeal From The Supreme Court Of Appeals Of West Virginia

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees' motion to dismiss or affirm requires the following brief response:

1. Appellees suggest that the affidavits of Bancorp's President and the Senior Deputy Comptroller of the Currency—which demonstrate that the order of the state courts below requiring Bancorp to divest control of one of the national banks it had previously acquired was inconsistent with the Comptroller's plenary authority over the ownership of national banks—are not part of the record. In fact, as indicated by the state supreme court's quotation of a portion of one of the affidavits (App. 3a, n.1), they were part of the record below.

In any event, the parties agree that this appeal presents the Court solely with a legal question: Whether a state may (1) retroactively invalidate an acquisition of control of national banks that had previously been approved by both the Comptroller of the Currency and the Board of Governors of the Federal Reserve System and (2) force the divestiture of control of one of the banks over the express objection of the Comptroller?

2. In their motion, appellees simply ignore the prior rulings of this Court and the other federal courts cited in the jurisdictional statement which establish that a state has no such authority to nullify an ownership interest in a national bank that was lawfully acquired pursuant to the express approval of federal banking officials. (*See* Jurisdictional Statement at 7-9 & nn. 4-6.) The appellees cannot refute the well-established rule that such a state statute cannot be applied to a national bank where, as here, it would

> "expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed on them by the law of the United States." *McClellan* v. *Chipman*, 164 U.S. 347, 357 (1896).

Nor can the appellees evade the federal statutes which demonstrate that it is solely within the province of the Comptroller of the Currency—rather than the states—to assess the need for a new national bank, the character and ability of its management, and the adequacy of its capital. (*See* Jurisdictional Statement at 9-10 & n. 7.) The appellees do not cite a single case authorizing a state to interfere with an existing control relationship of a national bank lawfully acquired with the Comptroller's express approval. No such case exists.

3. Unable to cite any precedent to support the ruling of the courts below, the appellees rely on the savings proviso in Section 7 of the Bank Holding Company Act, 12 U.S.C. § 1846, and cases that concern the prospective regulation of the activities of bank holding companies. While even such prospective state restrictions on the ownership of national banks are open to substantial question under the Supremacy Clause, such restrictions are far different from the retroactive divestiture that has been ordered in this case. A divestiture order, by its very nature, intrudes into existing relationships and thus trenches on the Comptroller's plenary supervisory authority over national banks. As demonstrated in the jurisdictional statement (n. 10), Section 7 did not grant the states any such new authority over national banks; it was simply an expression of Congress' intent not to preempt any preexisting authority the states may have had to regulate the activity of bank holding companies.

4. There is likewise no merit in the appellees' reliance on two "contracts clause" cases which held that mortgage and stock agreements were subject to state regulation. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934); *Veix* v. *Sixth Ward Building & Loan Ass'n of Newark*, 310 U.S. 32 (1940). Neither case concerned the ownership of a national bank. As described in the jurisdictional statement, the vice of the state regulation in this case is that it conflicts with the Comptroller's plenary authority over the ownership of national banks; that conflict exists without regard to any question under the "contracts clause."

5. Finally, the appellees quote *dicta* from one case which concerned the rights of stockholders in a federal home loan

bank. *Fahey* v. *O'Melveny & Myers*, 200 F.2d 420 (9th Cir. 1952). That case, however, did not involve an attempt by a *state* to interfere with the ownership of a national bank. Rather, it concerned the modification of rights of stockholders in a bank whose merger was brought about by the Federal Home Loan Bank Board. *Id.* at 425, 442, 444-45. *Fahey* thus in no way stands for the proposition that a state may interfere with the ownership of a federally created entity.

CONCLUSION

For the reasons stated in the jurisdictional statement as well as the reasons given above, the appellees' motion to dismiss or affirm should be denied, and the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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No. 81-219

In the Supreme Court of the United States

OCTOBER TERM, 1981

FIRST WEST VIRGINIA BANCORP, INC., ET AL.,
APPELLANTS

v.

SECURITY NATIONAL BANK & TRUST CO., ET AL.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in the circumstances of this case, a West Virginia statute prohibiting ownership or control of more than one national bank by an existing federally approved bank holding company is preempted by the National Bank Act.

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ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General files this brief in response to the Court's invitation to state the views of the United States.

STATUTES INVOLVED

Section 7 of the Bank Holding Company Act, 12 U.S.C. 1846, provides:

> The enactment by the Congress of this [Act] shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

W. Va. Code § 31A-8-12(b) (1975), as amended, provides in pertinent part:

> It shall be unlawful for any individual, partnership, society, association, firm, institution, trust, syndicate, public or private corporation, or any other legal entity, or combination of entities acting in concert, to directly or indirectly own, control or hold with power to vote, twenty-five percent or more of the voting shares of each of two or more banks, or to control in any manner the election of a majority of the directors of two or more banks * * *.

STATEMENT

This is an appeal under 28 U.S.C. 1257(2) from the final judgment of the Supreme Court of Appeals of West Virginia, entered May 5, 1981, holding that § 31A-8-12(b) of the West Virginia Code (1975) as applied in this case does not violate the Supremacy Clause of the United States Constitution. The appeal is brought by First West Virginia Bancorp, Inc. (Bancorp), a bank holding company, and its two subsidiary national banks. These national banks were acquired by Bancorp on January 30, 1975, following approval of the transaction by the Federal Reserve Board and the Comptroller of the Currency. J.S. App. 2a-3a.

In June of 1975, West Virginia amended its banking code to prohibit any person or entity from holding more than 25 % of the voting shares of more

than one bank. W. Va. Code § 31A-8-12(b) (1975). Prior to the June 1975 amendment, § 31A-8-12(b) (1972) did not prohibit ownership of stock in more than one banking institution, provided the stock was held solely for investment purposes. The statute, however, did prohibit purchasing or holding stock to perfect control of one or more banks, and had been interpreted by a state banking regulatory agency as prohibiting formation of a bank holding company (J.S. App. 5a).[1]

On December 22, 1977, Security National Bank & Trust Company and Half Dollar Trust and Savings Bank, financial institutions in competition with appellant banks in the Wheeling, West Virginia, market, filed an action in state court challenging Bancorp's ownership of the two national banks. On October 17, 1979, the Circuit Court of Ohio County held that Bancorp's control of the two banks was unlawful under § 31A-8-12(b) and Bancorp was directed to divest its shares in the banks within six months so as to comply with that law (J.S. App. 8a-12a).

Bancorp subsequently filed a motion for reconsideration, arguing that the state statute as applied impermissibly conflicted with and therefore was preempted by federal banking law. In support of its motion for reconsideration, Bancorp submitted the affidavit of Paul M. Homan, Senior Deputy Comptroller of the Currency for Bank Supervision, expressing his reservations concerning the potential impact of the ordered divestiture on the Comptroller's regulatory authority (J.S. App. 28a-31a). The circuit court subsequently denied Bancorp's motion

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[1] Litigation challenging this interpretation of the statute was mooted by the 1975 amendment (J.S. App. 5a).

for reconsideration and Bancorp petitioned the Supreme Court of Appeals of West Virginia for a writ of error. That court affirmed the lower court's ruling (J.S. App. 1a-7a).

DISCUSSION

Although the decision of the Supreme Court of Appeals of West Virginia raises important concerns regarding a state's ability to intrude upon the regulatory authority of the Comptroller of the Currency, application of state law to appellants on the facts of this case does not result in such a "direct and positive" conflict with federal banking law as to warrant a finding of preemption under the Supremacy Clause. *Kelly* v. *Washington*, 302 U.S. 1, 10 (1937). Accordingly, the appeal should be dismissed for want of a substantial federal question.

1. In a case such as this, state law is superseded by federal law only if that result gives effect to " 'the clear and manifest purpose of Congress' " (*Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), or if the state enactment "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The touchstone for the preemption question in this case, therefore, is congressional intent. Section 7 of the Bank Holding Company Act, 12 U.S.C. 1846, sheds substantial light on Congress' intent in this context. That section provides:

> The enactment by the Congress of this [Act] shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with

respect to banks, bank holding companies, and subsidiaries thereof.

As this Court recently has emphasized, Section 7 "reserve[s] to the States a general power to enact regulations applicable to bank holding companies." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 48 (1980). Congress enacted Section 7 to enable the states "to exercise a veto" over bank holding companies that otherwise might be organized as a means of avoiding state anti-branch banking laws. *Grandview Bank & Trust Co.* v. *Board of Governors*, 550 F.2d 415, 419-420 (8th Cir.), cert. denied, 434 U.S. 821 (1977). See also H.R. Rep. No. 609, 84th Cong., 1st Sess. 3-4, 14-15 (1955); S. Rep. No. 1095 (Pt. 1), 84th Cong., 1st Sess. 10-11 (1955); 102 Cong. Rec. 6920 (1956) (remarks of Sen. Robertson). As an example of the type of legislation states may enact under Section 7, one of the sponsors of the bill cited a Georgia statute that expressly applied to national banks and generally prohibited a bank holding company from acquiring control of more than two banks. 102 Cong. Rec. 6752-6753 (1956) (remarks of Sen. Robertson). Section 7 clearly evidences a congressional determination that state regulation of the ownership of national banks by bank holding companies, at least prospectively, does not impair the federal government's plenary regulatory authority over the national banking system. See P. Heller, *Handbook of Federal Bank Holding Company Law* 147-153 (1976).

2. Despite the state's authority under Section 7 to regulate ownership of national banks by bank holding companies, the decision of the Supreme Court of Appeals of West Virginia raises important concerns regarding the ability of a state to intrude upon

the on-going operations of a national bank. While the state can clearly prohibit the future acquisition of a national bank by a bank holding company, its power to compel an existing federally approved holding company to divest a national bank raises different questions. A state has no authority to prohibit the creation of national banks or to confine or restrict their operation in areas approved by Congress (*Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558-559 (1963)), and state law may not be applied to national banks if it will "interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 656 (1924).

The Comptroller of the Currency is the regulatory official responsible under the National Bank Act for the direct supervision of national banks and the national banking system. 12 U.S.C. 1 *et seq.* Congress has granted the Comptroller broad authority to regulate the affairs of national banks to ensure the safety and soundness of their operations. The Comptroller has discretion to determine the need for a new national bank, to assess the character and quality of its proposed management, and to determine the adequacy of its capital structure. The Comptroller exercises initial approval authority over the selection of the organizers and management of a new national bank,[2] maintains continuing supervision over the management and ownership of a national bank, including disapproval authority over the proproposed transfer of 10 % or more of the voting stock of a national bank,[3] and may, in appropriate

[2] See 12 C.F.R. 5.20(c).

[3] See 12 U.S.C. 1817(j).

cases, take necessary enforcement action to effectuate the suspension or removal of an officer or director of a national bank.[4]

Divestiture orders like the one entered by the court below can disrupt the normal regulatory relationship between the Comptroller and a national bank. Disruption of this on-going supervisory relationship could have serious consequences in some cases for the national banking system for, as noted in the affidavit of the Senior Deputy Comptroller of the Currency for Bank Supervision (J.S. App. 30a):

> The Comptroller's authority to determine who may control a new national bank, and to whom control may be transferred, is of particular importance to his ability to administer the system of national banks because of the impact that a controlling shareholder can have upon the health, stability and competitive effectiveness of a national bank.

In addition to possible intrusion upon the regulatory prerogatives of the Comptroller, a state court divestiture order could significantly threaten the management, financial resources, competitive strength and overall operation of a national bank. Such a divestiture might result in an unsatisfactory purchaser, a weakening of the bank's financial condition, or in a liquidation of the bank in order to comply with the state law—all thwarting the federal interest in the financial soundness and continued existence of the bank. A state court, furthermore, may not always give adequate consideration to the possible consequences of a forced divestiture, since it is the federal government—not the state—that

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[4] See 12 U.S.C. 1818(e).

ultimately would be liable for the failure of a national bank. The Federal Deposit Insurance Corporation, not the state, would bear the economic burden of any bank failure arising out of a forced divestiture.

In short, it is possible to envisage situations where a state court's interference with the ownership of an existing national bank could impede the purposes for which the bank was created and impair its efficiency as a federal entity. *First National Bank in St. Louis* v. *Missouri*, *supra*, 263 U.S. at 656. Preemption of the conflicting state law in those circumstances would be mandatory. *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954); *Easton* v. *Iowa*, 188 U.S. 220 (1903).

3. *a.* In spite of these concerns, however, the United States is of the view that application of the West Virginia statute to appellants does not give rise to a conflict with the National Bank Act that would require invalidation of the state enactment under the Supremacy Clause. "Preemption analysis focuses on whether the state law serves as an obstacle to the operation of federal law 'in the circumstances of this particular case,' rather than in all cases or in a hypothetical case." *Kennecott Corp.* v. *Smith*, 637 F.2d 181, 188 (3d Cir. 1980), quoting *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977). See also *Hines* v. *Davidowitz*, *supra*, 312 U.S. at 67. Thus, before finding state law to be displaced, there must be a conflict of "substance" (*New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 423 n.29 (1973)); preemption will not be found if it is possible to "reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted'" (*Merrill Lynch, Pierce, Fenner*

& Smith, Inc. v. *Ware*, 414 U.S. 117, 127 (1973), quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963)). The facts of this case do not show a conflict between state and federal law that meets these standards. See *Alessi* v. *Raybestos-Manhattan, Inc.*, No. 79-1943 (May 18, 1981), slip op. 16.

The concerns expressed by appellants, and referred to by the Senior Deputy Comptroller in his affidavit, are largely hypothetical in nature (J.S. App. 30a). Appellants are concerned that "a change in the control of a national bank *could* threaten to weaken the bank," and warn that "forcing a change in the control of a national bank *could* encroach upon [the Comptroller's] authority and prerogatives" (*ibid.*; emphasis added). Apart from a self-serving ex parte affidavit from the president of Bancorp (J.S. App. 21a-27a), however, there is no evidence that divestiture of one of the national banks held by Bancorp would seriously threaten the continued operation of the bank or render either of the banks such an unattractive investment that no qualified purchasers would come forward to acquire it.[8] The

[8] Although the divestiture might "increase overhead costs" (J.S. App. 24a) for the two banks by depriving them of economies of scale, the mere fact that state regulation has some adverse impact on the competitive fortunes of regulated entities is insufficient to invalidate state economic regulation. "[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978). Furthermore, a state statute banning bank holding companies necessarily entails a legislative decision to forego the advantages of economies of scale in favor of the perceived advantages of a unitary banking system. And under such a regulatory regime, all banks within the state are subject to the same groundrules in competing with each other. Since Con-

Deputy Comptroller, furthermore, other than voicing general concerns that the existing regulatory relationship between the Comptroller and Bancorp will be disturbed and the federal approval of Bancorp's structure will be "undone," points to no specific prerogative of the Comptroller under the National Bank Act that is thwarted by application of the West Virginia statute to appellants. Of course, if the bank holding company itself decided to sell one or more of its subsidiary banks, this also would "undo" the approval of the banking authorities that permitted the initial acquisitions. However, no provision of federal law compels continuing ownership of several banks in a holding company system. Thus, the need to preserve a relationship that continues largely at the discretion of the regulated party is a slender reed upon which to place the full weight of a constitutional preemption claim.[8]

With no evidence that application of state law here will endanger the national banks involved

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gress in Section 7 of the Bank Holding Company Act left the states free to choose a unitary or a branch-banking system, the ultimate wisdom of that choice cannot be a ground for invalidating legislation prohibiting bank holding companies.

[8] Moreover, the related concern that divestiture will somehow intrude upon the "Comptroller's authority to determine who may control a new national bank, and to whom control may be transferred" (App. 30a) is likewise insufficient to support a preemption argument. Upon divestiture of the national bank, the Comptroller will have full authority to screen prospective purchasers and thereby "determine who may control" the bank and "to whom control may be transferred." The divestiture required by state law, therefore, does not present a "repugnance or conflict [that] is so 'direct and positive' " that the state statute and the National Bank Act "cannot 'be reconciled or consistently stand together.' " *Kelly* v. *Washington, supra*, 302 U.S. at 10.

or thwart any substantial policy of the National Bank Act, this case is most certainly one where application of state law "*may possibly* lead to conflicts," but not one "where conflicts *will necessarily* arise." *Goldstein* v. *California*, 412 U.S. 546, 554 (1973) (emphasis in original). As this Court noted in *Goldstein*, " '[i]t is not * * * a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty' " (412 U.S. at 554-555, quoting *The Federalist* No. 32, at 243 (B. Wright ed. 1961)). Because there is nothing more than "a mere possibility of inconvenience in the exercise of [federal] powers" on the present record, this case does not present a substantial preemption issue. See, *e.g.*, *National Bank* v. *Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870) ("[i]t is only when the State law incapacitates the banks from discharging their duties to the government that [State law] becomes unconstitutional").[7]

b. In addition to the hypothetical nature of the preemption arguments in this case, appellants have failed to come to grips with Section 7 of the Bank Holding Company Act. Appellants seek to avoid the impact of Section 7 by arguing that, whatever the

[7] *National Bank* upheld a state law taxing the shareholders of a national bank and requiring the bank to participate in the collection of the tax. The Court emphasized that the bank was "subject to the laws of the state" in the absence of a conflict with federal statutory objectives: "the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government" (76 U.S. (9 Wall.) at 362). See also *id.* at 361.

states may do "prospectively" under that section, they cannot rely on Section 7 to affect bank holding companies "retroactively" (J.S. 10-11). It is unclear, however, whether the congressional understanding—reflected in the legislative history of Section 7—that states may prohibit formation of holding companies involving national banks is so easily confined. In any event, it is clear that application of the West Virginia statute to appellants in this case is not retroactive.

"Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). See also *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), slip op. 22-23. Appellants' efforts to portray the current application of the West Virginia statute as "retroactive" (J.S. 5) cannot alter the fact that West Virginia has merely implemented a policy choice Congress left the states free to make—whether or not they will allow multi-bank holding companies to operate within their jurisdictions. Application of West Virginia's policy against such companies to appellants is not, in any meaningful sense, "retroactive." The statute does not penalize actions taken in the past; instead, it declares the policy of the state as of the time of its enactment and requires banking organizations to bring their business operations into compliance.

Indeed, the Board of Governors of the Federal Reserve Board has applied the West Virginia statute

to a bank holding company that had received formal federal approval before enactment of the West Virginia statute. In *Intermountain Bankshares*, 61 Fed. Res. Bull. 442 (1975), the Board, on remand from the Fourth Circuit, relied on the new West Virginia statute to vacate its original authorization to establish a bank holding company. The Board did not view the West Virginia law as applying retroactively (61 Fed. Res. Bull. at 442):

> The new West Virginia statute seems clearly to prohibit the formation of multibank holding companies after June 5, 1975, and, if read literally, would seem to prohibit the continued ownership after that date of more than 25 per cent of the stock of two banks. Thus, whether or not the transactions proposed by Intermountain were consummated before June 5, 1975, the shares so acquired could not lawfully be held by Intermountain after that date.

Appellants' attempt to establish preemption of the statute "as retroactively applied" (J.S. i), therefore, is unavailing. The West Virginia statute has not been "retroactively" applied to invalidate the original acquisition of the two national banks by Bancorp, but rather has been applied to require divestiture of stock Bancorp could not lawfully hold after June 5, 1975.

c. Finally, even if there were merit to the claim that, as a general matter, it is unfair or disruptive to apply the state statute to previously existing holding company structures, it is far from clear on this record that Bancorp should escape the trial court's order of divestiture. At the time Bancorp was established in 1975, the existing West Virginia statute clearly prohibited purchasing or holding stock to perfect control of one or more banks, and the West Vir-

ginia Board of Banking and Financial Institutions had interpreted the law as prohibiting formation of bank holding companies (J.S. App. 5a). Although a lower state court had disagreed with the state regulatory agency's interpretation of the statute, that litigation was mooted by enactment of the 1975 amendment before the Supreme Court of Appeals could resolve the question (*ibid.*). The view of the state's highest court on the coverage of the earlier statute, however, is sufficiently clear from that court's opinion below, which observed that Bancorp was "in apparent violation of the old statute" at the time of its initial organization (*ibid.*).

To avoid this difficulty, Bancorp asserts that the holding company's organization was lawful because "no one ever suggested that the acquisition by Bancorp was illegal under state law in 1974 when it was reviewed and approved by federal banking officials" (J.S. 11 n.8). Unawareness of state law, however, is insufficient to excuse a private party's noncompliance with that law. Whether or not an issue regarding the lawfulness of the acquistion under state law was raised, the Federal Reserve Board could not "approve an application by a bank holding company if consummation of the proposal contemplated by such application would be prohibited by a valid State law." *Intermountain Bankshares, supra*, 61 Fed. Res. Bull. at 442, citing *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419 (1965). In these circumstances, appellants' claim that application of the 1975 enactment amounts to an unfair or disruptive enforcement of the law on a retroactive basis is wholly without merit. Cf. *First National Bank* v. *Dickinson*, 396 U.S. 122 (1969) (operation of mobile banking office and off-premises bank depository by national

bank violates state anti-branching law regardless of formal approval of the procedures by the Comptroller).

4. In concluding that application of the amended West Virginia statute to appellants on the facts of this particular case does not run afoul of the Supremacy Clause, the United States does not mean to suggest that states have a general power to intrude upon the day-to-day operations, management, or control of national banks. West Virginia, by applying § 31A-8-12(b) to appellants, merely implemented a policy regarding the ownership structure of bank holding companies that was within the sphere of choices left open to the state by Congress. 12 U.S.C. 1846. Application of that policy to appellants, on the facts of this case, does not raise a substantial federal question, although similar state actions in different circumstances may well raise significant preemption problems.[8]

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[8] While the United States believes that application of the West Virginia statute to a bank holding company raises no substantial preemption question on the facts of this case, application of the statute to other persons or entities may raise more difficult issues. The West Virginia statute (W. Va. Code § 31A-8-12(b) (1975)) broadly prohibits multiple ownership of national banks by "any individual, partnership, society, association, firm, institution, trust, syndicate, public or private corporation, or any other legal entity, or combination of entities acting in concert." Although Section 7 of the Bank Holding Company Act may justify application of the multiple ownership proscription of the statute to bank holding companies, a broader application of that proscription could raise more serious preemption issues. A state proscription on multiple ownership of national banks by "any individual," for example, could conflict with the prerogative of the Comptroller to oversee the management and control of national banks.

The divestiture in this case, furthermore, must proceed in such a manner as not to intrude upon the legitimate regulatory concerns of the Comptroller. In particular, the divestiture should proceed at a pace and in a manner consistent with the Comptroller's obligation to ensure that the sale and purchase of either bank is compatible with the paramount federal interest in maintaining the strength, solvency and competitive viability of the national bank system. Should the proposed six-month period currently specified in the divestiture order prove insufficient to adequately protect these interests, the United States is of the view that affected parties—including the Comptroller—must be permitted to apply to the state court for modification of the terms of the divestiture order. We assume that, in such circumstances, the state court—in compliance with both the Supremacy Clause and traditional principles of equity—would reshape the present injunction to accommodate the federal interest. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944).*

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* The power—and obligation—of the state court to reformulate its divestiture order if necessary to protect important federal interests is beyond question. As this Court stated in *Hecht Co.* v. *Bowles*, *supra*, 321 U.S. at 329-330:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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Appellant's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FIRST WEST VIRGINIA BANCORP, INC.,
FIRST WEST VIRGINIA BANK, N.A.—COMMUNITY, and
FIRST WEST VIRGINIA BANK, N.A.—WARWOOD,
Appellants,

v.

SECURITY NATIONAL BANK & TRUST CO., and
HALF DOLLAR TRUST AND SAVINGS BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY OF APPELLANTS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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No. 81-219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FIRST WEST VIRGINIA BANCORP, INC.,
FIRST WEST VIRGINIA BANK, N.A.—COMMUNITY, and
FIRST WEST VIRGINIA BANK, N.A.—WARWOOD,
Appellants,

v.

SECURITY NATIONAL BANK & TRUST CO., and
HALF DOLLAR TRUST AND SAVINGS BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY OF APPELLANTS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Brief for the United States as Amicus Curiae (the "Amicus Brief") recognizes that the decision of the Supreme Court of Appeals of West Virginia in this case raises grave concerns about the authority of a state to intrude upon the operations of the national banking system by compelling a change in the ownership of a national bank—ownership lawfully acquired with the approval of federal banking agencies. Despite these concerns, however, the Amicus Brief argues that this appeal should be dismissed because, under "preemption analysis," the "facts of this case" do not show a conflict between state and federal law that is irreconcilable.

Appellants respectfully submit that the Amicus Brief misconceives the issue before this Court. The question is not whether there is an irreconcilable "conflict" between two parallel schemes of general business regulation, as the Amicus Brief seems to suggest. Rather, the question is whether a state may enact *any* law purporting to regulate a fundamental attribute—in this case, ownership—of an existing instrumentality of the federal government. The answer is found in an unbroken line of cases dealing with state attempts to regulate national banks. Those cases hold that where a state law threatens to interfere with such federally-created instrumentalities, it is invalid without regard to its actual effect in a particular case.

Even if a case-by-case analysis were appropriate, the Amicus Brief is incorrect in asserting that "the facts of this case" do not warrant invalidation of the West Virginia statute. The state courts below granted summary judgment to the plaintiffs without any inquiry into the effect of the divestiture ordered under the state statute. The only evidence in the record on that issue is the uncontroverted affidavit of appellants' president to the effect that such a forced divestiture would seriously impair the financial stability and competitive vigor of the divested bank. Thus, if, as the Amicus Brief contends, this case turns on an assessment of the actual effect of the application of the state law, the appropriate disposition by this Court is not a summary dismissal, but rather a remand to the state courts for the necessary factual inquiry.

DISCUSSION

1. In arguing that "preemption analysis" requires a detailed factual inquiry in a case such as this to determine whether there is an irreconcilable conflict between state and federal authority, the Amicus Brief fails to distinguish between those cases involving overlapping state and federal regulation

of private businesses created under state law[1] and the wholly separate line of cases concerning the inapplicability of state law to federal instrumentalities.

National banks are just such instrumentalities of the federal government, created to carry out national objectives. *Franklin National Bank* v. *New York*, 347 U.S. 373, 375 (1954); *First National Bank* v. *California*, 262 U.S. 366, 369 (1923). This Court has repeatedly held that intrusions by the states into aspects of the national banking system are thus invalid without regard to the actual effect of the intrusion in a particular case.

This fundamental rule has been clear since *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—the touchstone for all subsequent decisions dealing with attempts by the states to regulate banking institutions created under federal law. In *M'Culloch*, it was argued that the state's attempt to tax the Bank of the United States should be voided only if it amounted to an effort to destroy or impair the bank. The Court flatly rejected any such consideration of the actual effect of the state intrusion, emphasizing that the controlling issue was the state's authority to interfere at all with a federal instrumentality:

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government the

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[1] All of the authorities cited in the Amicus Brief involve the regulation of private businesses created under state law. *See, e.g., Alessi* v. *Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895 (1981) (state statute regulating workmen's compensation claims preempted by federal legislation); *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (lawsuit under a state statute raising issues about the fitness of truckers licensed in an ICC action preempted); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) (state statute requiring equalization of gasoline prices not preempted by proviso in Robinson-Patman Act which might otherwise permit price differentials); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) (state regulation of oil tankers preempted in part); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977) (state regulation of meatpackers preempted in part); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (state regulation of warehousemen preempted in part).

> power to control the constitutional measures of another . . . are propositions not to be denied. But [according to the state] all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. . . .
>
> "But is this a case of confidence? Would the people of any one State trust those of another with the power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of [the federal] government to which they have confided their most important and most valuable interests? . . . This, then, is not a case of confidence. . . ." 17 U.S. at 431.

In the years since *M'Culloch*, the Court has consistently adhered to this standard. When an issue is presented as to the validity of a state's effort to regulate the operations of a national bank, the proper inquiry is not whether the state law will adversely affect a particular national bank in the particular circumstances presented, but whether the state regulation in question is inconsistent with the plenary authority of the federal government over its own instrumentalities.

For example, in *First National Bank* v. *California*, 262 U.S. 366 (1923), the Court, reasoning that a state could not prohibit a national bank from accepting deposits, held that a state likewise could not reach those deposits through an escheat statute. The Court rejected the argument that the actual effect of such a modest statute would not be severe, quoting its prior decision in *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U.S. 29, 33-34:

> "National banks . . . are instrumentalities designed to be used to aid the government in the administration of an important branch of the public service. . . . Being such means, brought into existence for this

> purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is a usurpation of power which a single State cannot give.' " 262 U.S. at 369.

Similarly, in *Easton* v. *Iowa*, 188 U.S. 220 (1903), the Court voided a state statute prohibiting insolvent banks from accepting deposits in the face of an argument that the statute would not have an adverse effect on any legitimate banking operations. Despite the undeniably beneficial purpose of the state law, this Court rejected the reasoning of the state supreme court which had concluded that

> ' "it was not intended by any act of Congress that officers of a national bank should be clothed with the power to cheat and defraud its patrons . . . . [W]e can conceive of no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking." ' *Id.* at 229.

The Court held that such an "effects" approach was not proper:

> "We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States.
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> • • •
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> "Such being the nature of these national institutions, it must be obvious that their operations cannot be limited or controlled by state legislation. . . ." *Id.* at 229-30.

None of the many decisions of this Court holding that state authority may not intrude in any significant way into the functioning of the national banking system even suggests that a factual inquiry into the effects of the interference in a particular case, of the sort suggested in the Amicus Brief, is necessary to vindicate federal supremacy in this area.[2]

There certainly can be no serious question that the assertion by a state of the power to regulate and, if it chooses, to force a change in the ownership of a national bank trenches on one of the most basic attributes of these federal instrumentalities. No less than the power to tax, the power to regulate ownership—in particular the power to force a change in ownership lawfully acquired—implies a power to destroy.

To be sure, a forced change in the ownership of a national bank may, under some circumstances, have an insignificant impact on the bank, just as might the imposition of some states taxes. But a forced disruption in ownership clearly has the potential for serious interference with the operations of the bank, as even the Amicus recognizes. *Amicus Brief* at 5-8. It cannot seriously be argued that the validity of a state's effort to intrude into such a critical aspect of the national banking system as the qualifications of existing ownership can be made to turn upon the vagaries of a particular bank's situation. It is the *potential* for harmful interference that places the West Virginia statute among those fundamental intrusions into federal prerogatives that cannot be tolerated.

2. Assuming it is necessary to assess the actual effect upon a national bank of a state-compelled change in its ownership, the state courts in this case made no such inquiry and rendered no such findings with respect to the impact of the West Virginia statute on the appellant national banks. Clearly, the courts

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[2] *See, e.g., Franklin National Bank* v. *New York*, 347 U.S. 373 (1954); *Jennings* v. *United States Fidelity & G. Co.*, 294 U.S. 216 (1935); *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U.S. 227 (1935); *Missouri ex rel. Burnes National Bank* v. *Duncan*, 265 U.S. 17 (1924); *First National Bank* v. *Fellows*, 244 U.S. 416 (1917); *Davis* v. *Elmira Savings Bank*, 161 U.S. 275 (1896).

below—in granting summary judgment to the appellees—concluded that such an inquiry was simply irrelevant.

In fact, there was ample evidence in the record testifying to the harmful effect of the forced divestiture ordered below. The uncontradicted affidavit of appellants' president[3] described in detail the adverse impact upon the financial and competitive strength of the two national banks that would result from the divestiture (*Jurisdictional Statement*, App.21a-27a), and the Senior Deputy Comptroller of the Currency corroborated that prediction. (*Id.*, App.28a-31a).

There is nothing in the opinions of either the lower state court or the Supreme Court of Appeals of West Virginia to suggest that either believed that the divestiture order would not have such a seriously disruptive effect. To the contrary, the Supreme Court of Appeals quoted at length from the affidavit of appellants' president, including his testimony that the divestiture decree "would seriously threaten the competitive ability and financial stability of one or both banks" and "would adversely affect both banks for years to come by depriving the banks of the strength and management resources that were a primary purpose of the acquisition." (*Id.*, App. 3a, n.1).

If this Court should accept the arguments of the Amicus Brief that the record is inadequate to assess the actual impact of a forced divestiture upon the two national banks, the appropriate disposition of this case is not a dismissal of the appeal for lack of substantial federal question. The question presented is clearly substantial. Since the courts of West Virginia did not make the type of factual inquiry the Amicus Brief argues is essential, the proper disposition would be to vacate the decision below and remand the case to the state courts for the development of an adequate record.

3. The Amicus Brief recognizes that the concerns raised by the application of the West Virginia statute compelling a

[3] The Amicus Brief erroneously characterizes the affidavit as "ex parte." In fact the affidavit was served upon appellees as part of appellants' motion for reconsideration before the lower state court.

divestiture of the existing ownership of one of the banks in this case are not alleviated by Section 7 of the Bank Holding Company Act of 1956 ("BHCA"), 12 U.S.C. § 1846. *Amicus Brief* at 5-6. Nevertheless, the Amicus Brief suggests that, to the extent Section 7 permits the *prospective* regulation of the operation of bank holding companies, it has some indirect application in this case. This suggestion—which is made without any supporting authority—is incorrect.[4]

Contrary to the assumption in the Amicus Brief, Section 7 is not a grant or delegation of power to the states. Congress' intent in enacting Section 7, as its very language makes clear, was to guard against the possibility that the enactment of the BHCA might be construed to preempt *otherwise* valid state laws regulating bank holding companies. As this Court recently stated,

> "Nothing in [the] language [of Section 7] or its legislative history [supports] the contention that it was also intended to extend to the states new powers to regulate banking that they would not have possessed absent the federal legislation." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980).

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[4] There is no merit in the suggestion in the Amicus Brief that the Federal Reserve Board somehow endorsed the retrospective application of the West Virginia statute to compel a divestiture of the existing ownership of a national bank in *Intermountain Bankshares*, 61 Fed. Res. Bull. 442 (1975). The West Virginia law prohibiting multiple ownership of banks was enacted *before* the Federal Reserve Board's decision in *Intermountain Bankshares* became final and *before* the two national banks had been acquired. No issue was raised as to the constitutionality of the West Virginia statute, and the Federal Reserve did not address that issue.

In the present case, the banks had been acquired and had been operating as an integrated unit more than six months before the West Virginia statute was enacted and more than two years before their joint operation was challenged. As the Amicus recognizes, the application of the state statute to divest existing ownership of an operating national bank raises materially different concerns than the prospective application in *Intermountain Bankshares*.

The issue thus remains quite unaffected by Section 7 of the BHCA: By what authority do the states presume to govern the ownership of a banking institution created under federal law?[5] While appellants believe that the Court need not reach this issue in its broadest application in this case—since, as even the Amicus Brief concedes, a forced change in existing ownership clearly presents more serious threats to national banks than does a limitation on eligibility to become an owner in the future—the question is by no means as simple as the Amicus Brief suggests.[6]

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[5] The illogic of the position advanced in the Amicus is heightened by its recognition (*Amicus Brief* at 15, n. 8) that a state prohibition against multiple ownership of banks by individuals would very likely be unconstitutional as applied to national banks. The Amicus Brief overlooks the fact that the West Virginia statute in fact purports to prohibit all forms of multiple ownership of banks in West Virginia, including ownership by individuals. While the present case involves corporate rather than individual ownership, the constitutional issue is identical. Moreover, if West Virginia could not constitutionally apply the law to ownership of national banks by individuals, it cannot simply be assumed that the state would have intended the law to be severable, so as to apply only to corporate ownership.

[6] We note that this broader question would be unavoidably raised if the Court were to accept the suggestion in the Amicus Brief that the West Virginia statute prohibited corporate ownership of national banks even before the federal banking agencies approved the acquisitions in this case. The Supreme Court of Appeals of West Virginia clearly did not base its judgment on such a holding. Rather, as noted in the Jurisdictional Statement, both the West Virginia courts applied the 1975 prohibition against multiple ownership that was enacted *after* appellants' affiliation had been consummated pursuant to federal authority. In any event, if there is any question about the applicability of the prior state statute—which had been held to be inapplicable by the highest West Virginia court to consider the question—that issue must first be decided by the state courts on remand.

CONCLUSION

As the Amicus Brief clearly recognizes, the application of the West Virginia statute to compel a change in the existing ownership of a national bank raises grave concerns for the integrity and independence of the national banking system. For that reason alone, this case warrants plenary consideration by this Court.

Should the Court believe that this case requires an inquiry into the likely effects of the divestiture order on the particular national banks in this case, the appropriate course is to remand the case to the state courts for the development of a full record. Were this Court to affirm summarily the decisions of the state courts below which did not make any findings on that issue, or were it to dismiss this appeal for want of a substantial federal question, the decisions below will stand for the proposition that a state may compel the divestiture of ownership of an existing national bank without any regard for the adverse consequences of that action—a proposition even the Amicus Brief quite properly rejects.

Respectfully submitted,

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